THE UNIVERSITY OF TEXAS BULLETIN
No. 3028: July 22, 1930

TRIAL BY JURY

By

THOMAS A. ROUSSE

Interscholastic League Bureau
Division of Extension

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The benefits of education and of useful knowledge, generally diffused through a community, are essential to the preservation of a free government.

Sam Houston

Cultivated mind is the guardian genius of democracy. . . . It is the only dictator that freemen acknowledge and the only security that freemen desire.

Mirabeau B. Lamar

FOREWORD

In accordance with its usual practice, the Interscholastic League is issuing this bulletin for the help and convenience of students who wish to prepare themselves for entry into the debating contests of the League.

In the interest of economy, the League has discontinued furnishing free copies, and is thus enabled to reduce the price to 15 cents per copy. The large free distribution in former years to many schools not participating in debate increased the cost to those schools purchasing extra copies, and hence it seems wise to discontinue the free distribution, and reduce the cost to those schools actually using the publication.

The Extension Loan Library, University Station, Austin, Texas, will furnish any school official in Texas who applies for the same a package library on the present question, which he may keep for a period of two weeks.

The present bulletin was compiled by Thomas A. Rousse, Adjunct Professor of Public Speaking, The University of Texas.

The League endorses and commends to debating coaches and judges the following statement of the aims of this contest:

"The purpose of practice debating is to teach young men [and young women] to think, and to speak their thoughts effectively. Debaters who are so trained should be given precedence over those who recite vigorously memorized speeches. The college or high-school debater who declaims, in all probability has not written the speech himself. Too much help by the coaches [and commercial bureaus] is doing much to bring disrepute upon all debating. If judges have the courage to distinguish between declamation and speaking from the floor, they can do much to raise the standard of school debating."

It will be noted that the current rules provide for county eliminations in debate on a percentage basis which will leave only the two strongest teams in each division to compete at the county meet. No attempt should be made to prevent "scouting." Indeed, it is desirable for teams and coaches to hear just as many League debates as possible.

Coaches are cautioned to study carefully the "Instruction to Judges" which appears in the "Rules for Debate" in the current issue of the Constitution and Rules.

ROY BEDICHEK,

Chief, Interscholastic League Bureau,
Extension Division, The University of Texas.

"Good argument is a sharp process of investigation, leading by mutual criticism to some nearer ascertainment of truth."

J. L. GARVIN.

"It is easy to say that in every dispute we should have no other aim than the advancement of truth; but before dispute no one knows where it is" . . .

ARTHUR SCHOPENHAUER.

"The gods have given us speech—the power which has civilized human life; and shall we not strive to make the best of it?"

ISOCRATES.

Verily, Glaucon, I said, glorious is the power of the art of contradiction!

Why do you say so?

Because I think that many a man falls into the practice against his will. When he thinks that he is reasoning he is really disputing, just because he cannot define and divide, and so know that of which he is speaking, and he will pursue a mere verbal opposition in the spirit of contention and not of fair discussion.

Yes, he replied, such is very often the case; but what has that to do with us and our argument?

A great deal; for there is certainly a danger of our getting unintentionally into a verbal opposition.

PLATO: *The Republic,* Book V.

EXPLANATION

The Brief and the reading material included in the Bulletin, it is believed, cover the essential points on the jury question. The maaterial, however, is not at all inclusive, but merely indicative and should be used as a starting point to the study of the subject. Texas authorities as well as the Texas Statutes have been quoted, in order to give the debater a local as well as a national view of the jury question. For a broader and more extensive study, the debater should procure, along with other readings, the valuable material collected by the Package Loan Library, Extension Division, of The University of Texas.

In preparing the brief, an attempt has been made to cite at least one authority for each contention. It should be noted, however, that the reference given for each point is not the only one and the debater should substantiate his argument with several other equally well-known authorities.

Attention should also be called to the fact that the Jury question is one based on authorities rather than statistics. The relative importance, therefore, of the opinions of the different experts should not be overlooked.

Ingenuity in the preparation of the debate is very desirable and the debater should construct his own individual case without adhering too closely to the Bulletin or other briefs. At best, the Bulletin contains only a general survey of the subject. The debater is left to decide for himself the strong and weak points of the subject.

Quotations from this Bulletin, or other sources, should be properly pointed out by the debater, in order to avoid the charge of plagiarism. It should be remembered, too, that the word of a well-known authority has much more weight with the audience and judges than the mere assertion of the speaker.

It is hoped that this Bulletin will be of aid in the study of the Jury question.

Good luck!

THOMAS A. ROUSSE.

The University of Texas,
September 10, 1930.

SUGGESTIVE BRIEFS

Resolved, That a Substitute for Trial by Jury Should be Adopted.

INTRODUCTION

I. The question of trial by jury is a very important one, because
   A. There has been much discussion for a number of years of the efficiency of the judiciary.
   B. The proper and expedient administration of the laws is of vital concern to the entire nation.

II. Definitions:
   A. Jury: "A body of men sworn to give a true answer, or verdict, on some matter submitted to them, especially such a body legally chosen to inquire into any matter of fact, and to render a verdict according to the evidence."[1]
      1. Number and Nature of the Jury: The term "Trial by Jury" refers to the common-law jury of twelve men, "who try questions in issue, and pass finally upon the truth of the facts in dispute."[2] In short, the common-law jury discussed in the Bulletin is one composed of twelve men of the community, selected under the law, who receive all of the evidence at the trial, and the law from the Judge, and then render a verdict.[3]
   B. By the term "Substitute" we mean a tribunal of one or more judges. This tribunal (usually composed of three judges, but not necessarily) shall perform the duties of the jury.[4]
   C. Civil and criminal cases are included in the discussion of trial by a jury and in trial by a tribunal of judges.

III. Admitted Matter.
   A. Both sides will admit the necessity of an adequate system for the proper and expedient administration of justice.
   B. Both sides will admit the feasibility of amending the State and National Constitutions.

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[1]Webster's Collegiate Dictionary, 8d Edition of the Merriam Series.

[2]Cyclopedic Law Dictionary, 2d Edition.

[3]Patterson, C. P., "American Government," pp. 705-709.

[4]Webster's Collegiate Dictionary: Substitute: "To put in the place of another person or thing; exchange."

It should be noted here that the term "Substitute" is not synonymous with the term "Modification." The latter term means "partial alteration"—Webster's; whereas by "Substitute" we mean here an exchange of Trial by Jury for Trial by a Tribunal of Judges.

IV. Irrelevant Matter.
  A. A discussion of the grand jury.
  B. A discussion of the coroner's jury.
  C. A discussion of the justice of the peace court jury.

V. The Main Issues.
  A. Is trial by jury efficient?
  B. Is trial by jury necessary?
  C. Is the substitute plan (tribunal) practical?

DISCUSSION OF THE AFFIRMATIVE

I. Trial by a jury is grossly inefficient as a means of administering justice, because
  A. It causes unnecessary delay and expense for the trial of a legal suit, for
    1. The process of selection of a jury is lengthy and tedious, for
      a. The sheriff must draw the names of prospective jurors from the jury wheel and serve each man.[1]
      b. A large number of prospective jurors are called.[2]
      c. Time and energy is wasted in the lengthy examination and cross-examination of the prospective jurors.[3]
    2. The actual trial of a suit is slow and cumbersome, for
      a. The lawyers attempt to put on a show and advertise themselves.[4]
      b. The lawyers argue over the admissibility of evidence.[5]
      c. The lawyers attempt to disqualify witnesses on the other side before the jury with tedious and inane questions.[6]
      d. The jury must receive instructions at every stage of the trial.[7]
    3. Change of venue is often necessary, for
      a. It is impossible to obtain an unbiased jury to try the suit.[8]
    4. Juries often fail to reach a verdict after several days of deliberation and have to be discharged,[9] for

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[1]Mathews, J. M., The Jury System, from "American State Government."
[2]*Ibid.*
[3]Potts, C. S., "Criminal Law—What's Wrong With It?"
[4]*Ibid.*
[5]*Ibid.*
[6]Willoughby, W. F., The Petty Jury System, from "Principles of Judicial Administration.
[7]*Ibid.*
[8]Mathews, J. M.
[9]*Ibid.*

a. A unanimous verdict is required.[10]
b. There may be a "sinker" in the jury.[11]

5. The court dockets are cluttered with unmeritorious claims, for
   a. Unscrupulous litigants and lawyers attempt to win verdicts on emotional or prejudicial appeals to the jury.[12]

B. The average juror is not qualified for the work he is called on to perform in the trial of a case, for
1. The process of selection bars the more intelligent men from jury service, for[13]
   a. Professional men, such as doctors, lawyers, etc., are exempt from service.
   b. The average busy citizen shuns jury service and disqualifies himself whenever possible.
   c. The attorneys disqualify many intelligent veniremen through the use of the peremptory challenge.
   d. Prospective jurors must be unfamiliar with current events.[14]
2. The average juror is partial and prejudiced, for
   a. the decisions of juries show that they read their own emotions into the law.[15]
   b. The law recognizes the existence for this prejudice, for
      1. The jurors are held practically under arrest during the trial of a case.[16]
   c. It is relatively easy for the lawyers to arouse political or religious prejudices in the minds of the juror.[17]
   d. jurors are sometimes corrupted either through fear, or worse motives, and return verdicts in defiance of the law.[18]
   e. The average juror is prejudiced against corporations.[19]
3. The average juror is not capable to pass upon the facts of a case, for[20]
   a. The evidence presented in a case is usually of a complicated nature.

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[10]Willoughby, W. F.
[11]Gossett, Ed L., "A Substitute for Trial by Jury."
[12]*Ibid.*
[13]Willoughby, W. F.
[14]Greer, H. W., "Should Trial by Jury be Abolished?"
[15]Willoughby, W. F.
[16]Greer, H. W.
[17]*Ibid.*—also, Gossett.
[18]*Ibid.*
[19]Gossett, Ed L.
[20]*Ibid.*

b. The attorneys present complicated arguments in an attempt to cloud the real facts and to raise doubts in the minds of the jurors.
c. The juror is not allowed to take down any of the testimony given during the trial and he must trust his memory.[20b]
d. The surroundings of the courtroom are strange to the average juror and he cannot think clearly.

4. The average juror is not capable of applying the law as given by the charge of the court to the facts in the case and render a proper verdict, for
a. The juror is not learned in the law, for[21]
1. Law is a science and proper understanding of it may not be had even in a good fifteen-minute lecture by a good judge.
b. The charge of the judge to the jury on the law is complicated and all-inclusive.
c. The application of the law to the facts requires a trained mind.[22]

C. Trial by jury has failed to meet the need of today, for
1. It is largely responsible for the increase in crime, for
a. Felony cases, such as murder, tried by juries, are increasing.
b. The crime increase is uniform over the nation and the blame cannot be put on municipal authorities, for
(1) The criminals are arrested.
(2) The criminals are tried.
c. Criminals demand trial before a jury, for
(1) It is their safest refuge,[23]
(2) The possibilities for a reversal due to errors are multiplied.
d. Trial by jury is found to be administering justice at a rate of less than 50 per cent.[24]

2. It is being discarded in the majority of civil cases, for
a. It is cheaper to settle out of court rather than stand the expense and uncertainty of justice of the jury trial.
b. Numerous boards, commissions, etc., have been created to expedite the settlement of disputes.

3. Many states have abolished trial by jury in numerous instances in civil cases and in criminal cases.[25]

[20b]"Jurors may not take notes of the testimonies of witnesses to refresh their memories in consultation with their fellow jurors."—Bouvier's Law Dictionary.
[21]Greer, H. W.
[22]Willoughby, W. F.
[23]McWhorter, J. C., "Abolish the Jury."
[24]Kavanaugh, M. A., Amer. Law Review, July-August, 1925.
[25]Green, Leon, "Why Trial by Jury?" Amer. Merc. XV, No. 57, Sept., 1928.

D. The elimination of the many inefficiencies of trial by jury is not possible, for
   1. The defects are inherent within the system, for
      a. Educational and intellectual standards cannot be changed, for
         (1) The better qualified citizens are in occupations that forbid them to spend the time required to try a case.
         (2) The citizens would resent any attempt at mental discrimination.
      b. Prejudice and emotion cannot be abolished by legislation.
      c. The law of evidence cannot be eliminated, for[26]
         (1) The jury must be guarded as much as possible from inadmissible and and prejudicial evidence.

II. Trial by jury is not necessary, because
   A. There is no need for political protection today, for
      1. There is no absolute sovereign in the United States.
      2. Officials charged with the administration of the law are directly or indirectly responsible to the people, for[27]
         a. They are either elected by the people, or appointed by those who have been elected by and are responsible to the people.
   B. There is no need for judicial protection today, for
      1. The judges will be either elected or appointed by those responsible to the people.[28]
      2. A judge may be removed from his office for misconduct.
      3. The Supreme Court of the State has the power to reverse any decision of the lower court.
      4. The veto power of the Governor can be used to guard against any act of injustice by the judge.
   C. It has outlived its usefulness, for
      1. It was created to deal with medieval conditions which no longer exist, for
         a. Trial by jury was created to guard the people from the tyranny of the sovereign.
         b. There is no absolute sovereign in the United States.
         c. There is no ruling "class" in the United States.
      2. It does not meet the demand for expedient justice of the modern times, for
         a. Modern business conditions are complicated and demand specialization.
         b. It is an "ox-cart" in an age of airplanes.

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[26]*Ibid.*
[27]Willoughby, W. F.
[28]Green, Leon.

D. The tendency is already toward discarding trial by jury for a more efficient method of administering justice, for
   1. The majority of civil cases are tried without a jury.[28]
   2. An increasing number of states are discarding the jury in criminal cases.[29]
   3. Cases in equity, admiralty, and probate are tried without a jury.
   4. In England, trial by jury has almost disappeared, for
      a. The right of trial by jury is granted at the discretion of the judge.[30]
      b. About 95 per cent of the cases are tried without juries.[31]
   5. Trial by jury does not prevail in the Netherlands today, and the crime rate there is much lower than that of the United States.
   6. In Illinois and Maryland, the right to trial before a judge is extended even in the most serious capital cases.[32]

III. A tribunal of one or more judges should be substituted for trial by jury, because

A. The judge is better qualified to determine the relative value of the facts presented in the trial of a suit, for
   1. The judge is trained in logical thinking and analysis.[33]
   2. The judge is better able to understand complicated fact situations.[34]
   3. The judge is experienced in handling, daily, various cases and he can better discriminate the value of conflicting evidence.
   4. In a judge trial, without a jury, only the vital facts are contested.[35]
   5. The judge is not easily confused on the facts or the law.[36]
   6. The judge may take more time to investigate doubtful facts.[37]
   7. The judge does not need to trust to his memory, for
      a. He has all of the minutes of the court and may refer to them to refresh his memory.[38]
   8. Trial before a judge is a thinking process.[39]
   9. The judge may ask the lawyers and the witnesses questions in order to ascertain the truth.[40]
   10. The judge is better able to evaluate the veracity of the witnesses.[41]

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[29]Potts, C. S.

[30]Willoughby, W. F.

[31]*Ibid.*

[32]*Ibid.*

[33-41]Burdine, John Alton (on R. H. Elder) "The American Judge and the American Jury."

On the above citations, see also, Greer, H. S.; Gossett, Ed L.; Willoughby, W. F.; Green, Leon.

B. The judge is better qualified in the application of the law to the facts, for
   1. He is an expert in the legal profession.
   2. He is experienced in the application of the law to the facts, for[42]
      a. The judge tries numerous cases constantly.
   3. He will not be easily led away from the law by oratorical speeches.[43]
   4. The verdict of the judge is in conformity with the real facts of the case.
   5. He is better able to interpret the law and give it the meaning the legislators intended.

C. The judge is responsible for the decisions he renders, for[44]
   1. The decision he hands down is usually in writing and contains his reasons. The jury does not have to offer any reasons for its verdicts.
   2. The people can fix the responsibility of the verdicts on the judge, for
      a. He is held accountable for his work.
      b. His tenure of office is set and he is judged by the record he makes.
   3. He has professional pride in his chosen profession and he will uphold the law of the people.
   4. He is sensitive of the dignity and reputation of the court.

D. Trial by a tribunal of judges would eliminate costly delay and unnecessary expense, for
   1. Time would not be wasted in impaneling a jury.[45]
   2. Arguments over the admissibility of evidence would be eliminated,[46] for
      a. The judge is deemed by law to be able to discriminate between admissible and inadmissible evidence.
   3. Reversals and numerous appeals due to the complicated rules of evidence would be eliminated,[47] for
      a. It is not reversable error for a court to hear inadmissible evidence, per se, for he is deemed capable of disregarding facts not pertinent to the issue involved in the given case.
   4. There would be no long closing arguments before the judge, for
      a. The lawyers know that the judge would not be very susceptible to prejudiced oratory.

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[42]Burdine, John Alton.
[43]Gossett, Ed L.
[44]Green, Leon.
[45]Potts, C. S.
[46]Green, Leon; Burdine, John Alton.
[47–48–50]Green, Leon.

5. Time would not be wasted giving the jury instructions.[48]

E. A tribunal of one or more judge has proven itself practical, for[49]
   1. It is used in equity, admiralty, bankruptcy, and probate courts.
   2. Many states use judges in civil cases, trial by jury being optional.[50]
   3. Illinois and Maryland make the jury optional in capital cases.[51]
   4. Statistics show that only 13 per cent of the cases that are subject to (and have the right of) jury trial were tried by juries.[52]

F. A tribunal of one or more judges is desirable, for
   1. It will speed up justice.[53]
   2. It will eliminate hung juries.[54]
   3. It will minimize the possibility of corruption.[55]
   4. It will decrease the number of mistrials.[56]
   5. It will be less expensive to the litigants and to the state.[57]
   6. Innocent defendants will get quick justice.[58]
   7. Respect for law and order will be increased, for
      a. The verdicts will be more in accordance with the will of the people as expressed in their legislative enactments.
      b. Petty and unsubstantial suits will be eliminated, for (1) A tribunal of judges is less likely to be fooled.[59]
      c. Attorneys will pay more attention to the proper interpretation of the law and less to inflammatory oratory.
      d. Justice will be made sure, swift, and inexpensive.

CONCLUSION

A substitute for trial by jury should be adopted, because

I. Trial by a jury is grossly inefficient as a means of administering justice, for
   A. It causes unnecessary delay and expense for the trial of a legal suit.
   B. The average juror is not qualified for the work he is called on to perform in the trial of a case.
   C. Trial by jury has failed to meet the need of today.
   D. The elimination of the many inefficiencies of trial by jury is not possible.

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[49]Willoughby, W. F.
[51-52]Green, Leon.
[53, 56, 57]Bird, J. W. from
[55, 58]Illinois Bulletin.
[54-55]Gossett, Ed L.; Burdine, John Alton.
[59]Gossett, Ed L.

II. Trial by a jury is not necessary, for
  A. There is no need for political protection today.
  B. There is no need for judicial protection today.
  C. It has outlived its usefulness.
  D. The tendency is already toward discarding trial by jury for a more efficient method of administering justice.

III. A tribunal of one or more judges should be substituted for trial by jury, for
  A. The judge is better qualified to determine the relative value of the facts presented in the trial of a suit.
  B. The judge is better qualified in the application of the law to the facts.
  C. The judge is responsible for the decisions he renders.
  D. Trial by a tribunal of judges would eliminate costly delay and unnecessary expense.
  E. Trial by a tribunal of judges has proven itself practical.
  F. A tribunal of one or more judges is desirable.

DISCUSSION OF THE NEGATIVE

I. Trial by jury is inherently sound and efficient as a means of administering justice, because
  A. The average juror is well qualified to determine the simple facts in a case, for
    1. He is representative of the average layman.[1]
    2. The facts he deals with are those relating to the experiences of laymen.[2]
    3. The jurors, since they are a cross section of the entire community, represent more experience than one or three judges.
    4. The judgment of twelve men is better than that of one or three.
    5. The average juror is better educated now.[3]
  B. The average juror is capable of applying the law to the facts and rendering a verdict, for
    1. The judge explains the law involved in the case and points out how that law should be applied.
    2. The juror administers justice in the real sense of the word, for
      a. Justice is what the people conceive it to be.
      b. The juror interprets the law from the present conception of justice.[4]

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[1]Bradley, C. S., from the San Antonio *Light*, July 4, 1930.
[2]Umbreit, A. C., Trial by Jury: An Ineffective Survival.
[3]Wurts, John, The Jury System under Changing Conditions.
[4]Magaarden, Theodor, Current Criticism on Trial by Jury.

C. The inefficiencies charged to trial by jury are artificial and not inherent in the system, for[5]
   1. The numerous rules regarding the selection and the impaneling of a jury have been made by the lawyers and judges.
   2. The slow procedure in the trial of a case is due to the lawyers and the judges and could be eliminated.
   3. The rules of evidence are the handiwork of judges and they can be simplified.[6]
   4. Crowded dockets and reversals are due to the cumbersome procedure of our court system which is the handiwork of "experts" in the administration of justice, for
      a. The jury need only determine the facts, under the rules prescribed to it.

D. The inherent faults of trial by jury are only those of human nature, for
   1. They are due to our present standards of ideas and ideals that control the action of all the people in various degrees.
   2. These faults are present in the judges as well as in the jury,[7] for
      a. Jurors are not more corrupt than judges.[8]
      b. Judges, too, are not free from the influence of popular opinion.[9]

E. Trial by jury has been made efficient in England, for
   1. The system of court procedure has been simplified, for[10]
      a. The evils of selection have been eliminated.[11]
      b. The arguments before the jury have been forced more to the real points of the case.[12]
      c. The judge controls and governs the trial rather than the contesting attorneys.[13]
   2. The trial is impersonal and speedy, for[14]
      a. The judge aids the jury in the determination of the the facts and the application of the law.
      b. The attorneys are not permitted by the court to delay the trial or stage a show for the benefit of the populace.

F. Trial by jury is the best means available under a democratic government for the administration of justice, for
   1. The juries experience with life is broader than that of the judge.[15]

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[5]Wigmore, John H., First Aid to Trial by Jury.
[6]Baldwin, S. E., The Artificiality of Our Law of Evidence.
[7-9]Umbreit, A. C.
[10-14]Child, R. W., Justice and Horse Sense, *Sat. Eve. Post*, June 28, 1930.
[10]J. of Am. Jud. Soc., Vol. 10, No. 5, pp. 157-159.
[15]Black, J. S., *Exparte* Milligan.

2. The age and record of trial by jury is a recommendation for it.[16]
3. Impartial students and thinkers praise trial by jury,[17] for
   a. De Tocquerille; Montesquiem; Coke; Blackstone; H. G. Wells, all recommend the virtues of trial by jury.
4. Enlightened states, as they adopt the democratic form of government, adopt trial by jury, for
   a. Belgium adopted trial by jury in 1840.[18]
5. Attempts by tyrannical officials to discard trial by jury because of unsettled conditions have failed, for
   a. Lord Dumore failed to discard trial by jury for trial by a military tribunal.[19]
   b. General Gage, in Massachusetts, failed to discard trial by jury,[20] for
      (1) The people would not tolerate the change.
6. Outstanding judges and attorneys praise and uphold trial by jury,[21]
   a. Judges: Dillon, Caldwell, Weatherbe; Lord Pengance, Lord Russell.
   b. Arthur C. Train, Justice Fuller.[22]

G. The present so-called evils in trial by jury could be eliminated, for
1. England has eradicated practically all of its artificial and archaic rules of procedure.[23]
2. Juries could be made to function efficiently, without the necessity of locking them up and treating them like criminals.[24]
3. Juries could be made to function efficiently if the different members were allowed to take notes on the evidence and use them in their deliberations.[25]
4. The evils in the method of selecting jurors could be eliminated, for[26]
   a. The educational qualifications of the jurors could be increased.
   b. Fewer excuses from jury service could be granted.
   c. The questions asked the venire could be simplified.

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[16]Umbreit, A. C.
[17]Bagby, A. P., Should the Jury be Abolished?
[18-20]Black, J. S.
[21]Magaarden, Theodor.
[22]Bagby, A. P.
[23]Child, R. W.
[24-25]Bradley, C. S.
[26]Leighton, K. E., How About the Jury, J. of Am. Jud. Soc., Vol. 8, June, 1924. p. 246.

d. The successful system of selection used by the Federal Courts of the United States could be adopted by the different states.
e. The drawing of prospective jurors could be made public.[27]

5. The arbitrary and artificial rules of evidence could be eliminated.[28]
6. Prospective jurors could be properly instructed on the duties of serving on a jury.[29]
7. The judge could be given the power to aid and assist the jury in the determination of the facts.[30]
8. The judge could be given the power to aid and assist the jury in the application of the law to the facts.
9. Petty limitations imposed on the judge by the Legislature could be removed.[31]
10. Frequent and unnecessary changes of the rules of evidence could be eliminated.[32]
11. Reversals by the higher courts on absurd technicalities could be corrected.[33]
12. Lengthy examination of witnesses and unlimited number of objections by lawyers could be eliminated.[34]
13. The requirement that the jury should return a unanimous verdict could be discarded.[35]

II. Trial by jury is necessary, for
A. It is a fundamental part of a democratic government, for
1. Trial by jury is the only means the people have of participating directly in the administration of their laws.[36]
2. It educates the people in the theory and necessity of regulation of conduct by law.[37]
3. The people become a part of the law and order rather than fugitives from it.
4. The right of trial by jury is as important to the citizen as the right to vote, for
a. He controls the administration of the law, for
(1) Acting as a juror, he renders a verdict on the facts and the law of the case.
b. He controls, and can demand an accounting from, the law-enforcing agencies of the state.
5. It is the real test of a true democracy.[38]

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[27]Wurts, John.
[28]*Ibid.*
[29]*Editorials of the Month*, June 30, 1930, Houston, Texas.
[30]Bradley, C. S.
[31-35]Ogg and Ray, from "American Government," pp. 813-815.
[36]Umbreit, A. C.
[37]*Ibid.*
[38]*Editorials of the Month.*

6. The revolutionary leaders inserted the right to trial by jury in the Constitution, for[39]
   a. They desired to protect the people against the tyrannical rule of the government.

B. It serves as a check against a tyrannical judiciary, for
1. Judges tend to legislate through their decisions.[40]
2. Judges are case-hardened and follow archaic laws, for
   a. The old doctrine of "assumed risk" was applied in the present "machine age" to the great detriment of the workers.
3. Judges tend to be harsh and unsympathetic, but the jury tempers the rigor of the law with mercy.[41]
4. Judges are class prejudiced, for
   a. They sympathize with the ruling class rather than with the workmen.[42]
5. Judges misuse their power of discretion, for
   a. The use of the power to issue injunctions has been used for the capitalistic class and against the labor unions.
6. The people cannot be free when a government can punish without restraint.[43]

C. It serves as a check against any collusion between other officials of the government and the judiciary, for
1. The prosecutor may be in a position to control the judge and his decisions, through political power or other means.[44]
2. The sheriff and the police may combine with the judge against a defendant.
3. The judge tends to favor the state, for
   a. He is employed by the state.
   b. He desires to show a good record of convictions.

D. Serving on a jury is beneficial to the individual and the people as a whole, for[45]
1. It brings the juror into closer contact with his fellow citizens.
2. It gives him an active share in the administration of public affairs.
3. It makes the juror's influence felt in local affairs.
4. It creates respect for law and order.
5. It creates greater respect for the courts.

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[39]Black, J. S.
[40]Bagby, A. P.
[41]Megaarden, Theodor.
[42]Bagby, A. P.
[43]Black, J. S.
[44]Missouri Crime Survey, from the *Journal of American Judicature Society*, Vol. 10, No. 5, February, 1927.
[45]Umbreit, A. C.

III. Trial by a tribunal of one or more judges is impractical, for
  A. The judges are not experts in the determination of facts, as is the jury, for
    1. The facts deal with every-day lives of laymen.
    2. The judges are not in close touch, or in harmony, with the majority of the people.
    3. Judges may be ignorant.[46]
  B. Judges are prone to be too legalistic in their application of the law to the facts, for
    1. They apply the strict letter of the law rather than the essence.
    2. They often apply ancient, outworn law, on a case that may be contrary to present-day justice, in the absence of direct legislative enactment, for
      a. The judges applied the doctrine of "assumed risk" of the old factory days to modern conditions.
    3. The real purpose of constructive legislation is apt to be disregarded through the use of fine and minute definitions by the judges.
  C. Judges are just as human as is the jury, for
    1. They possess a class prejudice that is worse than that of the jury,[47] for
      a. It is limited to one group of people—the lawyers.
    2. They are subject to bribery.[48]
    3. They are subject to the same emotional appeals as is the jury, if not more so.[49]
  D. The judges would be subject to worse evils than the jury, if they are elected, for
    1. They would be controlled by the group responsible for their election to office.[50]
    2. They would be controlled by the political boss.[51]
    3. They may be good politicians but poor judges.
  E. The people would be subject to worse evils with judges, if they are appointed to the office for life, for
    1. The judges may misuse their trust.
    2. It would be hard to remove a judge from office for the violation of his duties, for
      a. He may only be removed by impeachment proceedings in the Legislature.
    3. The judges may do irreparable injury before they are removed.
    4. The judges may secure their office through the use of undue influence or graft.

[46-47]Umbreit, A. C.
[47]Bagby, A. P.
[48]Bagby A. P.
[48-51]Umbreit, A. C.

F. Much of the present misadministration of justice is due to the judges and other state officers, for
   1. The judges are responsible for the rules of evidence and all of their refinements, for
      a. Higher courts will reverse a case on slight technical grounds.[52]
   2. The judges consume more time in trying cases, for[53]
      a. The case is usually taken "under advisement" for several weeks or even months.
   3. The judges are influenced politically by the attorneys in the case.
   4. The judges, with the prosecutors, are responsible for the release of a large number of criminals.[54]
   5. Needless appeals, based on technicalities created by the judges, cause misadministration of justice.[55]
   6. The cumbersome procedure of the grand juries causes delay.[56]
   7. The free use of bail, permitted by judges, is the cause of much evil.[57]
   8. Absence of any unified control of the prosecutors and judges results in an uneven enforcement of the criminal law over the state.[58]
   9. Lengthy examinations of witnesses and unlimited number of objections that are permitted to the lawyers by the judge obscure the real issues of a case and lead to injustice.[59]
   10. Corrupt police and other state officials (who are under the jurisdiction and partial control of the judges) are responsible for the deplorable conditions existing in the cities.[60]

CONCLUSION

A substitute for trial by jury should not be adopted, because

I. Trial by jury is inherently sound and efficient as a means of administering justice, for
   A. The average juror is well qualified to determine the simple facts in a case.
   B. The average juror is capable of applying the law to the facts and rendering a verdict.
   C. The inefficiencies charged to trial by jury are artificial and not inherent in the system.

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[52]Wigmore, J. H.
[53, 55, 60]Bagby, A. P.
[54]Missouri Crime Survey.
[56–59]Ogg and Ray.

D. The inherent faults of trial by jury are only those of human nature.
E. Trial by jury has been made efficient in England.
F. Trial by jury is the best means available under a democratic government for the administration of justice.
G. The present so-called evils in trial by jury could be eliminated.

II. Trial by jury is necessary, for
A. It is a fundamental part of a democratic government.
B. It serves as a check against a tyrannical judiciary.
C. It serves as a check against any collusion between other officials of the government and the judiciary.
D. Serving on a jury is beneficial to the individual and the people as a whole.

III. Trial by a tribunal of one or more judges is impractical, for
A. The judges are not experts in the determination of facts, as is the jury.
B. Judges are prone to be too legalistic in their application of the law to the facts.
C. Judges are just as human as is the jury.
D. The judges would be subject to worse evils than the jury, if they are elected to office.
E. The people would be subject to worse evils with judges, if they are appointed to the office for life.
F. Much of the present misadministration of justice is due to the judges and other state officers.

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[1]*The Reference Shelf*, Vol. V, No. 6, and the *Congressional Digest* (8:257–80, Nov. '29) contain select bibliographies on the jury question. Duplication of material has been avoided as much as possible, since these two books are available to any member-school from the Extension Loan Library.

GENERAL MATERIAL

THE JURY SYSTEM

BY C. P. PATTERSON

(From *American Government*, pp. 705–709, D. C. Heath and Company, Publishers, New York, 1929

The jury is a fundamental part of the common-law system. The right of trial by jury in criminal cases is guaranteed by all the state constitutions and in civil cases by all except those of Louisiana and Utah.[1] There are two types of juries: (1) the grand jury, and (2) the petit jury. The grand jury is not a trial jury and is used only in the preliminary proceedings of criminal cases. It is required or permitted in all the states by either their constitutions or statutes.[2] At common law it consists of not less than twelve nor more than twenty-three members. While the common-law maximum is still observed by the states, the minimum has been considerably modified. Its size is determined by the constitutions in a number of states, and in Montana, Oregon, and Utah is fixed at seven, any five of whom may return an indictment. In several states the number is fixed at twelve with the concurrence of nine necessary for indictment.[3] In all the states there is some court, commission, or officer of the law whose duty it is to make a list or panel of suitable persons to be summoned for jury service. This list is called a venire and is delivered by the clerk of the court to the sheriff who summons those listed to appear for jury service. On the day of opening court, the names of those in the list are placed in a box, or a hat, or jury wheel, and as many are drawn as there are members in the jury, varying with the state. Those selected constitute the grand jury, or as it is sometimes called, the grand inquest. Then they elect or the court appoints one of their number foreman, and after having been sworn to investigate and present all offenses that may have been committed in the county, and charged by the court on their duties, they retire to their room to prosecute their inquiries in secret.[4]

1. *The Petit Jury.*—The petit or trial jury is a more serious part of judicial machinery, especially in criminal cases. The common law trial jury consists of twelve men in criminal cases. This is the rule in felony or capital cases, though in Florida eight, and in Utah six, constitute a jury for felony cases. Several states permit a jury of less than twelve for minor offenses. In civil cases the requisite number for the jury has been varied more radically. The constitutions

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[1]Thomas M. Cooley, *Constitutional Limitations* (8th Ed., 1927), II, 864.

[2]The constitutions of Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia, and Wisconsin do not require it.

[3]Kentucky, Louisiana, Missouri, Oklahoma, Texas, and Wyoming are in this group.

[4]*Constitutional Convention Bulletins* (Illinois, 1920), No. 10, 834.

of seven states permit their legislatures to provide for a jury of less than twelve.[5] The Constitution of Utah fixes the number at eight in courts of general jurisdiction. In Florida the number is fixed at six by statute. In Virginia the number is fixed by statute at seven except in the jurisdiction of the justice of the peace, where it is five. In several of the states, under certain conditions the parties to a case may waive the right of trial by jury in criminal and civil cases; and in some jurisdictions in civil cases this right is considered waived unless one of the parties demands a jury. In criminal cases as a rule this right cannot be waived in felonies.[6]

The number necessary to concur in a verdict in either criminal or civil cases is by no means uniform throughout the states. A unanimous verdict of a jury of twelve is required in all the states in capital cases, and also in felonies except in Louisiana.[7] Constitutional provision are made for three-fourths of the jury in Texas and Oklahoma and two-thirds in Montana and Idaho to render verdicts in misdemeanors. In civil cases a less than unanimous verdict is either provided or permitted in courts of record in eighteen states.

The selection of the trial jurors is a more tedious matter than that of the grand jurors. This is due to a system of challenges whereby either party to the suit may object to the jury as a whole or to individual jurors. After the clerk of the court has selected by lot from the panel or list of jurors the number required, the court directs the sheriff to have them take their seats in the jury box. The clerk then reads their names in the hearing of the parties, and if there is no objection, they are sworn and the trial proceeds. Either party, however, may object to the jury as a whole because of some actual or alleged irregularity committed in summoning it or to individual jurors because of their disqualifications. There are two classes of challenges to individual jurors; peremptory and casual. The peremptory challenges are absolute, but their number is limited or fixed. This number varies with the states and is larger in criminal than in civil cases.[8] The challenges for cause are unlimited in number, but the validity of the objections to any juror challenged for cause is determined by the court, which also passes upon the challenge to the array or jury as a whole.[9] All challenges are made when the jury is sworn. This process is continued until the requisite number of qualified jurors is obtained even if another venire has to be summoned.

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[5]This group includes Michigan, Colorado, Wyoming, South Dakota, New Jersey, Florida, and Virginia.

[6]The constitutions of Minnesota and Wisconsin provide that the jury may be waived in all cases in the manner prescribed by statute. Wisconsin by statute has provided that the accused may waive the jury and be tried by less than twelve men.

[7]*Illinois Constitutional Convention Bulletins*, 843-844.

[8]Three, four, five, and six are the usual numbers allowed to each party in civil cases. Callender, *op. cit.*, 95.

[9]Abraham Caruthers, *History of a Lawsuit* (5th Ed., 1919), 269–273.

2. *The Usual Qualifications of Jurors.*—The qualifications of jurors in general are that they be citizens,[10] twenty-one years of age, and freeholders or householders; that they be unrelated to either party to the case, unprejudiced toward either party, and uninterested in the outcome of the trial; and that they possess a sound mind, a good hearing, and a clear vision. Their qualifications are a state matter and, of course, vary in some respects from state to state.

The functions of the trial jury are to judge of the facts in the case and to render a verdict of guilty or not guilty in criminal cases and to assess the damages, if any, in civil cases. Sometimes there is no issue of fact to be determined in which case the judge directs the verdict of the jury. In some instances specific questions are submitted to the jury instead of the entire case. The jury deliberates in secret under the chairmanship of its foreman, who reports its decision in open court. If the requisite number to concur in its verdict is not obtained, the foreman so reports. This means that the case must be retried before a new jury. In most state jurisdictions, the jury almost controls the action of the courts; the judge has been reduced to a mere referee.

The trial jury has likewise received its share of criticisms. Its method of selection is cumbersome and expensive. The parties to the case and their lawyers are too influential in this process: Too many peremptory challenges are permitted; in fact challenges for cause seem entirely adequate.[11] The court should be a stronger factor in its selection. Jury service should be made difficult to evade as a means of securing a more intelligent and competent jury and should be extended to women on the same terms as to men.[12] Provisions should be made for less than a unanimous verdict in both civil and criminal cases with possibly a little less emphasis for this change in felonies or capital cases. The use of the jury should be optional with the parties in civil cases; the complicated character of civil litigation makes it exceedingly difficult for the ordinary jury to participate intelligently and efficiently in its adjudication. There should be provisions for waiver of jury trial in indictable offenses.[13] The right of jury trial should be extended to punishment for contempt in injunction cases.[14] The judge should be allowed to instruct the jury on the evidence as well as the law. This is the practice in both our federal courts and the English courts. The task of the modern jury is much more difficult than that of its ancient predecessor. The facts

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[10]Women are eligible to jury service in twenty-one states. See Julia Margaret Hicks, *Women Jurors* (1928), 10.

[11]Robert von Waschzisker, *Trial by Jury* (1922), 87–103.

[12]Robert Stewart Sutliffe, *Impressions of an Average Juryman* (1922), 9-13.

[13]Robert H. Elder, "Trial by Jury: Is It Passing?" 6 *Am. L. Sch. Rev.*, No. 6, 290-300 (1928).

[14]*Illinois Constitutional Convention Bulletins* (1920), 842–848.

involved in modern litigation are more technical and complicated than was formerly the case. The jury should welcome the opinion of the court on the relative weight and significance of the evidence submitted to it. The present practice in most states leaves the jury to be swayed by advocacy with no judicial corrective and is largely responsible for many retrials to correct the verdicts of previous juries.

METHOD OF SELECTION OF JUDGES

BY W. F. WILLOUGHBY

(From Principles of Judicial Administration. The Brookings Institution, Washington. 1929, pp. 361–381)

In the administrative branch, the problem of determining the methods to be employed in selecting personnel, the term for which they shall hold office, and the conditions under which they may be removed is, or should be, controlled by the single consideration of securing and retaining the services of capable and upright servants. In the case of judges, there is added to this consideration that of insuring that these officers will be selected in such a manner, and the conditions governing their tenure and removal, so fixed, that they will exercise their function independent of all outside influences and with sole regard to the facts and law as brought out in the proceedings before them. It is this factor that makes this problem, as it has to do with the judiciary, a special one.

Addressing ourselves first to the question of the method of selecting judges, examination of existing political systems reveals the following methods, among which a choice must be made:

1. Election by the people.
2. Election by the legislature.
3. Appointment by the chief justice of the supreme court.
4. Appointment by the chief executive.

The arguments in favor of and against each of these methods will be considered in turn.

Popular election.—The controlling argument in favor of the selection of judges by popular election is that in a popular government resting upon the principle of the separation of powers, those in control of each of the three branches of government should derive their offices from, and be responsible directly to, the people, and that a system, under which the officers of one branch hold office as the result of the choice of one of the other branches, does violence to the principle of the separation of powers. Particularly is this argument held to be strong in a political system in which, as in the United States, the judiciary has the important function of passing upon the constitutionality of legislative measures of a political and social character. To quote one of our ablest students of jurisprudence:

"Perhaps the most important influence in bringing about a demand for a greater popular control of the courts is the increasingly important position which the courts have come to exercise as political organs of the government through their powers to declare laws unconstitutional or violations of the guarantees of 'due process of law' and 'equal protection of the laws.' These guarantees mean whatever the courts in any particular case may decide that they mean and furnish a broad foundation upon which the courts may base declarations of unconstitutionality. As has been frequently suggested in recent years the courts have become practically legislative organs with an absolute power of veto over statutory legislation which they may regard as inexpedient; and this power has been used most frequently with respect to social and industrial legislation enacted to meet new social and economic conditions."

Though one can appreciate the basis of this position it is difficult to hold that it is not mistakenly taken. Judges are not the representatives of the people in the same way as those composing the legislative and executive branches. As has been pointed out in the consideration of an independent judiciary, it is of the essence of a function of a judge to oppose the will of the people, as represented by a majority, when that will proposes action in violation of constitutional provisions, and especially those for the protection of individual rights and liberties. Furthermore, little can be said in favor of this method from the standpoint of securing persons best fitted for the office. As the dean of one of our leading law schools has put it:

"Obviously a satisfactory selection for any office can be made only when the selecting power can acquire some fair knowledge of the fitness of individual candidates for the office. When the selecting power is the electorate at large such knowledge is difficult to acquire in proportion as the members of the electorate increase. Where offices are essentially political and their incumbents are charged with the duty of framing or of executing some one or more of competing policies, then the selective function of the electorate is performed under the most favorable circumstances—particularly if the offices to be filled are somewhat conspicuous and not too numerous. But in proportion as the requirements for office become technical, or the offices numerous, does the electorate become an inefficient instrument of selection. Now the principal qualities needed in a judge are personal integrity, adequate legal training, and a judicial temperament. The second of these is wholly technical and little reliable information about it is likely to be found outside of the members of the bar themselves. The other needed qualities can be ascertained by personal acquaintances, but very few lawyers of the sort that would make desirable judges have been able to make themselves known, either personally or by reputation, to more than a minute fraction of the electorate in any of our good-sized cities or in the judicial

districts that fill important judgeships. It is almost impossible for a lawyer to obtain a popular following of any size without a large expenditure of time and effort in ways altogether likely to make him less fitted for judicial office than if he faithfully devoted himself to his profession. . . . Indeed the obstacles in the way of any real public choice of judges by a numerous electorate are so great that in fact what almost invariably happens is that new candidates for judgeships are selected by the party leaders with little or no regard for the possibilities of any public preference in regard to these offices; and when a number of judges must be chosen at once as often happens in the large cities, the helplessness of the electorate is still greater."

This situation, Mr. Hall points out, is made even worse when use is made of the primary system of nomination:

"In the few states that have tried this, only chaos has resulted. Any lawyer being free to place his name in the nominating ballot by petition, large numbers have done so; and nearly all of these being but little known, a most disgusting campaign of personal advertising for the nomination has in many places ensued, followed to a great extent by the same kind of a campaign for election."

The Cleveland Survey is equally emphatic in condemning the use of the primary system for the nomination of judges. Its report reads:

"Cleveland has now had ten year's experience of the wide-open method of selection and, although few would care to return to the bossed party convention, it is safe to say there is scarcely a man in Cleveland able to weigh the qualifications for the bench who does not deplore the present tendencies and fear them. . . . Most serious is the present cheapening of the judicial office so that neither the bar, the press, nor the judicial incumbents themselves any longer respect it. Young lawyers who would have viewed the bench with reverence formerly, now give voice to their disrespect and retired and even sitting judges are openly cynical. The situation is summed up in the universal comment that the judges are generally above the suspicion of taking direct money bribes but find it difficult to forget the coming election."

The Survey then goes on to point out that one of the chief evils of the elective system, especially in combination with the primary, is the pressure upon judges seeking re-election to cater to groups, race, religion, labor, etc. "One of the most disturbing features" is the intensifying of social and religious appeals. A man is elected or appointed because he is a Pole, a Jew, an Irishman, a Mason, a Protestant." Labor, it points out, watches the judges to determine who are favorable to its side in labor controversies that get into court.

Election by legislature.—The method of selecting judges by election by the Legislature is one that, so far as the writer has knowledge, is employed by no foreign government. In the United States, it is

used by but four states: Vermont, Rhode Island, South Carolina, and Virginia. Whether considered from the standpoint of insuring an independent judiciary or of securing men best qualified for the position, the system has little to commend it. It is true that, in the states where it is used, reports indicate that in general men of good character and legal abilities have been selected, and that, with the possible exception of Rhode Island, political considerations have not exerted a seriously detrimental effect. The system is nevertheless one presenting a constant danger. It has a tendency to violate the principle of the separation of powers and to prevent the complete divorce of the judiciary from politics that is highly desirable. More attention to this method is not here given, since its further development in the United States is not to be apprehended.

Appointment by the head of the judicial branch.—A method of selection that has much to recommend it is that of having all judges, other than the chief justice of the court of last resort, appointed by the chief justice. This is the English system under which all judges of courts of record are appointed on the recommendation of the Lord Chancellor. The same system obtains in New Jersey in respect to the Court of Chancery, where the seven vice-chancellors of that court are appointed by its head, the Chancellor. In both cases, the system has given excellent results. The chief justice is not only outside of the field of partisan politics, and thus less likely than the chief executive to give consideration to this element in making selections, but is in an exceptionally strong position to select men who have the special qualifications required of judicial officers.

Though this system is foreign to the political practices of the American people it is possible, that the development of the system of a unified state court, with a chief justice exercising the powers and duties of a general manager, may carry with it the principle of having the associate justices selected in this way. It is certainly a step to be welcomed.

That this method is receiving some attention in the United States is evidenced by the recommendations made by a recent committee of the Cleveland Bar Association which was appointed to consider the subject. Its report recommends that the chief justice of the supreme court be elected by the people; that the associate justices of the supreme court be appointed by the governor, with the approval of two-thirds of the senate or by a judicial council selected by the senate; that the judges of appellate courts be appointed by the chief justice of the supreme court, with the approval of a majority of the associate justices of the supreme court; and the judges of the other courts be appointed by the chief justice of the supreme court, with the approval of a majority of the judges of the appellate courts for the respective districts within which the appointees are to serve. For all judges it recommends that the term of office be six or eight years.

Appointment by chief executive.—Appointment by the chief executive is the method usually employed by foreign governments in selecting their judges. In the United States it is the one prescribed by the Constitution for the selection of all federal judges. If safeguarded by the provision that the power of appointment does not carry with it the power of removal, by the requirement that removals may be effected only by the process of impeachment or joint address on the part of the two houses of the Legislature, the system, with the possible exception of the method of selection by appointment by the head of the judicial branch, more nearly meets the requirements of a desirable selective process than any other method. It is one where responsibility is definitely located and full opportunity is afforded to determine the qualifications of appointees. Certainly, experience indicates that under it better selections have been made than under the method of election by the people or by the Legislature.

Present conditions in the United States.—In few features of our political system is there a greater diversity of practice than in respect to this matter of the method of selecting judges. In the federal judicial system selection through appointment by the President is universal. In the states, however, many different methods are employed.

It will be seen from this statement (omitted) that thirty-six or three-fourths, of the forty-eight states select their judges by popular election. Of the remaining twelve, five, Delaware, Massachusetts, Mississippi, New Jersey, and New Hampshire, select their judges through appointment by the governor; five, Connecticut, Rhode Island, South Carolina, Vermont, and Virginia, through appointment by the Legislature; and two, Florida and Indiana, by a mixed method.

Methods of improving system of selection by popular vote.—Having stated the several methods of selection of judges and the arguments for and against each and described conditions in the United States in respect to the employment of these methods, it remains to determine the extent to which these conditions are satisfactory, and, if not, the direction that efforts for their change should take.

Students approaching the problem of the method of selecting judges from the theoretical or general standpoint, are in substantial agreement that the method of selection through appointment by the chief executive, or by the head of the judicial system, is best adapted to securing the double objective of an independent judiciary and judges of assured competence in respect to their technical and personal qualifications. To them, the improvement of the judicial systems of the states in respect to this feature lies in the abandonment of the method of selection by popular election or by the Legislature, and the adoption of the federal system of appointment by the chief executive. With this position the present writer is in thorough accord. Unfortunately, however, there is little or no probability that the states can be induced, within any reasonable time, to adopt this policy.

This being so, the practical problem of improving the judicial system of the states in respect to the method of selecting judges is that of improving the workings of the election system. In considering the problem from this restricted standpoint, one cannot do better than follow the arguments on the Committee on Judicial Selection in its report to the Conference of Bar Association Delegates, American Bar Association, July 7, 1924.

That report starts with the assumption above made, that efforts to improve conditions in the United States in respect to the selection of judges, if they are to have a practical character, must be directed toward betterment of the method of selection by popular vote rather than in seeking to have that method supplanted by one of the other methods. As is well-known, electorates do not directly select candidates for office; all that they do is to make a choice between two or three candidates who are brought forward by political parties, and more rarely by other organizations. The greatest opening for improving the popular-vote system, therefore, lies in the development of practices and traditions to ensure that the candidates will be of a high character.

The most effective means for securing this desirable end the committee finds to be that the organized bar shall play a dominating rôle in the nomination of candidates, or at least in passing upon the qualifications of candidates. In order that it may play this part, the bar must make definite provision in its constitution for the discharge of this function. In the United States this provision has taken three forms: (1) The whole matter of selecting, or passing upon the qualifications of, candidates for the bench is in effect turned over to a special committee; (2) use is made of a plebiscite vote of the entire membership of the bar association for the purpose of determining preferences in respect to candidates; and (3) use is made of a plebiscite, but the committee is charged with the duty of collecting and furnishing to the members information regarding prospective candidates, and in some cases of adding its own recommendations.

The contention that remedial efforts should take the form of improving the method of selection by popular vote rather than of attempting to abolish the elective system, is supported by the Cleveland Crime Survey and also by the conclusions reached by Professor Carpenter in his able study from which we have quoted. The Cleveland Survey, thus, first states its preference for the method of selection through appointment by the chief justice in the following words:

"It is the concensus of opinion of the bar and the unanimous conviction of the ablest students of our legal institutions that strong and well qualified judges are most certainly secured when they are appointed by the executive and hold office for life, subject, of course, to removal for misconduct. On the evidence, there is every reason

to believe that this method of selection, or a modification of it, plus long tenure, would do more than anything else to revolutionize the present state of affairs. If it be within the field of possibility this is unquestionably the goal to be striven for."

The report goes on to state, however, that in most cases the public will not accept this, and consequently the practical problem is to improve the elective system.

> The secret in obtaining good judges is that back of the method—whatever it is—there must be a tradition which makes the selecting group (i. e., nominating influence) realize that it is a clear public policy to retain judges in office except for grave mental, moral, or physical defects. This tradition has been built up in New York, Wisconsin, Vermont, Connecticut, and elsewhere.

Its final conclusions are set forth as follows:

(1) The appointive method with provision for a retirement election whereby a judge runs against his own record.
(2) A modified appointive method, as, for example, an elective chief justice who appoints his associates.
(3) A modified elective system whereby judges are elected for a short first term, but if reëlected, then for progressively longer terms. Judges standing for reëlection should not run against other candidates, but only against their own records. The single question presented to the electorate should be, "Shall this judge be retained?"

The fact that an elective system can be made to work with satisfaction, is, however, no conclusive argument in favor of the elective system. It will be noted that this system works in Wisconsin primarily because, while the system is elective in theory, it is in fact appointive, the real selection being made by the bar. The same or even better result could be had if the selection were made by the governor through appointment, being guided by the recommendations of the bar, as he in fact is in making interim appointments. Under existing conditions, the elective process adds nothing, while introducing an element of uncertainty that can do harm.

QUALITY OF STATE JUDGES

BY FRANK G. BATES AND OLIVER P. FIELD

(From *State Government*, pp. 384–385, Harper and Brothers, Publishers, New York, 1928)

The salaries paid to judges in the state courts above the grade of justice of peace courts vary considerably from one state to another. Usually the judges of the supreme courts of the state receive from one to several thousand dollars more annually than do the judges

of the courts of general trial jurisdiction. But between the amounts paid to justices of the supreme courts of the different states there is a difference so great that judges of this court in some states are paid eight times as much as those of some others. A typical salary for judges of the highest state court is from six to eight thousand dollars annually. The compensation of judges of the general trial courts range more commonly from four to six thousand dollars per year. The judges of state courts of record are almost always forbidden to accept fees, and must devote their entire time to their judicial duties. State judges as a whole have been regarded as underpaid, and in comparison with federal judges and those in foreign countries they are poorly paid. Few men will now accept appointments to the bench in the state unless they either have an independent income or are mediocre lawyers. However, it would be quite incorrect to say that this is true of all the men who accept judicial positions in the states, for in almost every state there are many judges of ability, and in the judicial history of practically every state there are to be found the names of very able and eminent judges. These judges have been able to exert great influence upon their brethren on the bench, and the result has been that the decisions of the courts of which these men have been members have been of a quality much superior to that which would otherwise have been expected from the general make-up of the court. Such judges as Doe of New Hampshire, Mitchell of Minnesota, Shaw of Massachusetts, Cooley of Michigan, and many others, compare very favorably with the men who have graced the federal bench. On the other hand, the fact must not be lost sight of that the judges of state courts as a group are not highly trained nor always eminently qualified for their work. They have sometimes been quite unaware of the social, economic, and political implications of their work, and have proceeded with the task of deciding cases in a purely mechanical manner. The relation of the legal system to society as a whole has been too often overlooked by the court in many states, and to this fact must be ascribed in some part at least the present current contempt in which the legal and judicial system is held by many people in all walks of life. The defective general education of many judges has been one cause of this situation, and to the extent that state judges are more broadly educated men, the tendency in the future will be for the courts to perform more intelligently and effectively their work as one of the agencies of human society. The work of state courts in the past should not be too severely criticized, however, because the tasks with which tribunals have been confronted in recent years have been both numerous and difficult, and the facilities placed at their disposal for effectively dealing with these tasks have been quite inadequate.

Art. III, Constitution of the United States

(From *Revised Civil Statutes of the State of Texas)*

Section I

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section II

1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and a citizen of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.
2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the others cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.
3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Art. V, Constitution of the State of Texas

(From *Revised Civil Statutes of the State of Texas,* pp. 35 and 43, Vol. I, 1925)

Section 1. The judicial power of this state shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be provided by law. The criminal district court of Galveston and Harris Counties shall continue with the district, jurisdiction, and organization now existing by law until otherwise provided by law. The

Legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

Sec. 26. The state shall have no right of appeal in criminal cases.

The Jury in Court

(From *Revised Civil Statutes of the State of Texas*, pp. 578–583, Vol. I, 1925)

Art. 2123. *Right to jury.*—The right to trial by jury shall remain inviolate, subject to the following rules and regulations. (Const., Art. 1, Sec. 15.)

Art. 2124. *Demand and fee.*—No jury trial shall be had in any civil suit, unless an application therefor be made in open court, and a jury fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county. (Acts 1876, p. 171; G. L., Vol. 8, p. 1007.)

Art. 2125. *Time to demand.*—Any party to a civil suit in the district or county court desiring to have the same tried by a jury, shall make an application therefor in open court on the first day of the term at which the suit is to be tried, unless the same be appearance day, in which event the application shall be made on default day. (Id.)

Art. 2126. *Call of docket for demand.*—On the first day of each term, the court shall call over the docket, except appearance cases, and shall note therein in each case whether or not a jury trial is applied for therein and by which party. On the call of the appearance docket, the court shall in like manner note in each appearance case whether or not and by whom a jury trial is applied for. (Id.)

Art. 2127. *Oath of inability.*—The deposit for a jury fee shall not be required when the party shall within the time for making such deposit, file with the clerk his affidavit to the effect that he is unable to make such deposit, and that he cannot, by the pledge of property or otherwise, obtain the money necessary for that purpose; and the court shall then order the clerk to enter the suit on the jury docket. (Acts 1876, p. 171; G. L., Vol. 8, p. 1007.)

Art. 2128. *Jury docket.*—The clerks of the district and county courts shall each keep a docket, styled "The Jury Docket," in which shall be entered in their order the cases in which jury trials have been ordered by the court. (Id.)

Art. 2129. *Jury trial day.*—The court shall, by an order entered on the minutes, designate any day during the term for the taking up of the jury docket and the trial of the cases thereon. Such order may be revoked or changed at discretion. (Acts 1876, p. 78; G. L., Vol. 8, p. 914.)

Art. 2130. *Withdrawing demand for jury.*—When one party has applied for a jury trial, he shall not be permitted to withdraw such application without the consent of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. (Id.)

Art. 2131. *Challenge to the array.*—Any party to a suit which is to be tried by a jury may, before the jury is drawn, challenge the array upon the ground that the officer summoning the jury has acted corruptly, and has wilfully summoned jurors known to be prejudiced against the party challenging or biased in favor of the adverse party. All such challenges must be in writing setting forth distinctly the grounds of such challenge and supported by the affidavit of the party or some other credible person. When such challenge is made, the court shall hear evidence and decide without delay whether or not the challenge shall be sustained. This article does not apply when the jurors summoned have been selected by jury commissioners. (Id.)

Art. 2132. *When challenge is sustained.*—If the challenge be sustained, the array of jurors summoned shall be discharged, and the court shall order other jurors summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on account of whose misconduct the challenge has been sustained, shall not summon any other jurors in the case. (Id.)

Art. 2133. *Qualifications.*—All men over twenty-one years of age are competent jurors, unless disqualified under some provision of this chapter. No man shall be qualified to serve as a juror who does not possess the following qualifications:

1. He must be a citizen of the state and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; provided, that his failure to pay poll taxes as required by law shall not be held to disqualify him for jury service in any instance.

2. He must be a freeholder within the state, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write, except in cases provided for in the succeeding article.

5. He must not have served as a juror for six days during the preceding six months in the district court, or during the preceding three months in the county court.

6. He must not have been convicted of felony.

7. He must not be under indictment or other legal accusation of theft or of any felony. Whenever it shall be made to appear to the court that the requisite number of jurors able to read and write cannot be found within the county, the court may dispense with the exception provided for in the fourth subdivision and the court

may in like manner dispense with the exception provided for in the fifth subdivision, when the county is so sparsely populated as to make its enforcement seriously inconvenient. (Acts 1905, p. 207; G. L., Vol. 8, p. 914.)

Art. 2134. *Disqualification.*—The following persons shall be disqualified to serve as jurors in any particular case:

1. Any witness in the case.
2. Any person interested, directly or indirectly, in the subject matter of the suit.
3. Any person related by consanguinity or affinity within the third degree to either of the parties to the suit.
4. Any person who has a bias or prejudice in favor of or against either of the parties.
5. Any person who has sat as a petit juror in a former trial of the same, or of another case, involving the same questions of fact. (Acts 1876, p. 83; G. L., Vol. 8, p. 914.)

Art. 2135. *Jury service.*—All competent jurors are liable to jury service, except the following persons:

1. All persons over sixty years of age.
2. All civil officers of this state and of the United States.
3. All overseers of roads.
4. All ministers of the gospel engaged in the active discharge of their ministerial duties.
5. All physicians and attorneys engaged in actual practice.
6. All publishers of newspapers, school masters, druggists, undertakers, telegraph operators, railroad station agents, ferrymen, and all millers engaged in grist, flouring, and saw mills.
7. All presidents, vice-presidents, conductors, and engineers of railroad companies when engaged in the regular and actual discharge of their respective positions.
8. Any person who has acted as a jury commissioner within the preceding twelve months.
9. All members of the national guard of this state under the provisions of the title "Militia."
10. In cities and towns having a population of fifteen hundred or more inhabitants, according to the last preceding United States census, the active members of organized fire companies, not to exceed twenty to each one thousand of such inhabitants. (Id.)

Art. 2137. *Filing of exemptions.*—All persons summoned as jurors in any court of this state, who are exempt by statutory law from jury service, may, if they so desire to claim their exemptions, make oath before any officer authorized by law to administer oaths, or before the officers summoning such persons, stating their exemptions,

and file said affidavit at any time before the convening of said court with the clerk of said court, which shall constitute sufficient excuse without appearing in person. (Acts 1907, p. 216.)

Art. 2142. *Challenge to juror.*—A challenge to a particular juror is either a challenge for cause or a peremptory challenge. The court shall decide without delay any such challenge, and if sustained, the juror shall be discharged from the particular case. Either such challenge may be made orally on the formation of a jury to try the case. (Id.)

Art. 2143. *Challenge for cause.*—When twelve or more jurors, if in the district court, or six or more, if in the county court, are drawn, and the lists of their names delivered to the parties, if either party desires to challenge any juror for cause, the challenge shall now be made. The name of a juror challenged and set aside for cause shall be erased from such lists. (Id.)

Art. 2144. *"Challenge for cause."*—A challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge. (Id.)

Art. 2145. *Certain questions not to be asked.*—In examining a juror, he shall not be asked a question the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands by some legal accusation with theft or any felony. (Id.)

Art. 2146. *Number reduced by challenge.*—If the challenges reduce the number of jurors to less than will constitute a legal jury, the court shall order other jurors to be drawn or summoned and their names written upon the list instead of those set aside for cause. (Id.)

Art. 2147. *Making peremptory challenge.*—If there remain on such lists not subject to challenge for cause, twelve names, if in the district court, or six names if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor. (Id.)

Art. 2148. *Number of peremptory challenges.*—Each party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. (Acts Dec. 1, 1871, p. 61; G. L., Vol. 7, p. 63.)

Art. 2149. *Lists returned to clerk.*—When the parties have made or declined to make their peremptory challenge, they shall deliver their lists to the clerk. The clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been erased; and if the case be in the county court, he shall call off the

first six names on the lists that have not been erased; those whose names are called shall be the jury. (Acts 1876, p. 78; G. L., Vol. 8, p. 914.)

Art. 2150. *If jury is incomplete.*—When by peremptory challenges the jury is left incomplete, the court shall direct other jurors to be drawn or summoned to complete the jury; and such other jurors shall be impaneled as in the first instance. (Id.)

Art. 2151. *Swearing jury.*—When the jury has been selected, such of them as have not been previously sworn for the trial of civil cases, shall be sworn by or under the direction of the court.

The Trial

(From *Revised Civil Statutes of the State of Texas*, pp. 587–588, Vol. 1, 1925)

Art. 2180. *Order of proceedings on trial by jury.*—The trial of cases before a jury shall proceed in the following order, unless the court should, for good cause, to be stated in the record, otherwise direct:

1. Plaintiff's petition shall be read to the jury.
2. Defendant's answer shall be read to the jury.
3. If there be any intervenor his pleadings shall be read.
4. The party upon whom rests the burden of proof on the whole case under the pleadings, shall be permitted to state to the jury briefly the nature of his claim or defense and facts relied upon in support thereof.
5. Such party shall then introduce his evidence.
6. The adverse party may then state briefly the nature of his defense or claim and the facts relied on in support thereof.
7. He shall then introduce his evidence.
8. The intervenor may, in like manner, make his statement, and shall then introduce his evidence.
9. The parties shall then be confined to rebutting testimony on each side.

Art. 2181. *Additional testimony.*—At any time before the conclusion of the argument the court may permit additional evidence to be offered to supply an omission where it clearly appears to be necessary to the due administration of justice.

Art. 2182. *Non-suit.*—At any time before the jury has retired, the plaintiff may take a non-suit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief. When the case is tried by the judge, such non-suit may be taken at any time before the decision is announced. (Acts 1853, p. 19; P. D., 1464; G. L., Vol. 3, p. 1302.)

Art. 2183. *Order of argument.*—After the evidence is concluded and the charge is read, the parties may argue the case to the jury. The party having the burden of proof on the whole case shall be

entitled to open and conclude the argument; where there are several parties having separate claims or defenses, the court shall prescribe the order of argument between them.

Charge of the Court

(From *Revised Civil Statutes of the State of Texas*, pp. 588–589, Vol. I, 1925)

Art. 2184. *Charge to jury.*—Unless expressly waived by the parties, the judge shall prepare and in open court deliver a written charge to the jury on the law of the case, or if the case is submitted on special issues, he shall submit the issues of fact to the jury. (Acts 1913, p. 113.)

Art. 2185. *Requisites.*—The charge shall be in writing, signed by the judge, filed with the clerk, and shall be a part of the record of the cause. It shall be prepared after the evidence has been concluded and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived. Failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon appeal upon proper exception. The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact. (Id.)

Art. 2186. *Special charges.*—Either party may present to the judge such written instructions as he desires to be given to the jury; and the judge may give such instructions, or a part thereof, or he may refuse to give them, as he may see proper. Such instructions shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. (Id.)

Art. 2187. *Charge read before argument.*—Before the argument is begun, the judge shall read to the jury, in the precise words in which they were written, his charge and all special charges which he may give. (Id.)

Case to Jury

(From *Revised Civil Statutes of the State of Texas*, pp. 590–591, Vol. I, 1925)

Art. 2191. *Number of jurors.*—The jury in the district courts shall be composed of twelve men; but the parties may by consent agree, in a particular case, to try with a less number. In county courts the jury shall be composed of six men.

Art. 2192. *Foreman of jury.*—Each jury shall appoint one of their body foreman.

Art. 2193. *Papers taken to jury room.*—The jury may take with them in their retirement the charges and instructions, general or special, which were given and read to them, and any written evidence, except the depositions of witnesses, but shall not take with them any special charges which have been refused. Where part only of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded.

Art. 2194. *Jury kept together.*—The jury may either decide a case in court or retire for deliberation. If they retire, they shall be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court; but the court in its discretion may permit them to separate temporarily for the night and at their meals, and for other proper purposes.

Art. 2195. *Officer shall attend jury.*—The officer in charge of the jury shall not make nor permit any communication to be made to them, except to inquiry if they have agreed upon a verdict, unless by order of the court; and he shall not before their verdict is rendered communicate to any person the state of their deliberations or the verdict agreed upon.

Art. 2196. *Judge to caution jury.*—If permitted to separate, either during the trial or after the case is submitted to them, the jury shall be admonished by the court that it is their duty not to converse with, or permit themselves to be addressed by, any other person, on any subject connected with the trial.

Art. 2197. *Jury may communicate with court.*—The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their foreman, communicate with the court, either verbally or in writing.

Art. 2198. *Jury may ask further instruction.*—After having retired, the jury may ask further instructions of the court touching any matter of law. For this purpose they shall appear before the judge in open court in a body and through their foreman state to the court, either verbally or in writing, the particular question of law upon which they desire further instruction; and the court shall give such instruction in writing, but no instruction shall be given except in conformity with the preceding rules and only upon the particular question on which it is asked.

Art. 2199. *Disagreement as to evidence.*—If the jury disagree as to the statement of any witness, they may, upon applying to the court, have such witness again brought upon the stand; and the judge shall direct him to repeat his testimony to the point in dispute, and no other, and as nearly as he can in the language used on the

trial; and on their notifying the court that they disagree as to any portion of a deposition or other paper not carried with them in their retirement, the court may, in like manner, permit such portion of said deposition or paper to be again read to the jury.

Art. 2200. *Discharge of jury.*—The jury, after the cause is submitted to them, may be discharged:

1. By the court when they cannot agree and both parties consent to their discharge, or, when they have been kept together for such time as to render it altogether improbable that they can agree.

2. By the court when any calamity or accident may, in the opinion of the court, require it.

3. By the court when by sickness or other cause their number is reduced below the number constituting the jury in such court.

4. By the final adjournment of the court before they have agreed upon the verdict.

5. Where a jury has been so discharged without having rendered a verdict, the cause may be again tried at the same or another term.

Art. 2201. *Court open for jury.*—The court during the deliberations of the jury, may proceed with other business or adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury.

Verdict

(From *Revised Civil Statutes of the State of Texas,* pp. 592–593, Vol. I, 1925)

Art. 2202. *Definition and substance.*—A verdict is a written declaration by a jury of its decision of the issues submitted to them in the case.

1. It shall be signed by the foreman of the jury and shall comprehend the whole or all the issues submitted to it.

2. The verdict is either a general or special verdict.

3. The jury shall render a general or special verdict as the court may direct.

4. A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all or any of the issues submitted to it.

5. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court.

6. A special verdict found under the provisions of this article shall, as between the parties, be conclusive as to the facts found. (Acts 1846, p. 363; Acts 1st C.S. 1897, p. 15; Acts 1913, p. 113; G. L., Vol. 2, p. 1669.)

Art. 2203. *Form of verdict.*—No special form of verdict is required, and the judgment shall not be arrested or reversed for mere

want of form therein if there has been substantial compliance with the requirements of the law in rendering a verdict. No verdict shall be rendered in any cause except upon the concurrence of all members of the jury trying the case. (Id.)

Art. 2204. *Verdict by nine jurors.*—Pending a trial of a civil case in the district court, where one or more jurors may die or be disabled from sitting, if there be as many as nine of the jurors remaining, those remaining may render and return a verdict; but in such case the verdict must be signed by each juror rendering it. (Acts 1876, p. 82; G.L. Vol. 8, p. 918.)

Art. 2205. *When jury have agreed.*—When the jury agree upon a verdict, they shall be brought into court by the proper officer, their names shall be called by the clerk, and they shall deliver their verdict to the clerk; and if they state that they have agreed, the verdict shall be read aloud by the clerk. If in proper form, and no juror dissent therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court.

Art. 2206. *Polling the jury.*—Either party shall have the right to have the jury polled, which is done by calling separately the name of each juror and asking him if it is his verdict. If any juror answer in the negative, the jury shall be retired for further deliberation.

Art. 2207. *Defective verdict.*—If the verdict is informal or defective, the court may direct it to be reformed at the bar. If not responsive to the issue submitted, the court shall call their attention thereto and send them back for further deliberation.

Formation of the Jury in Capital Cases

(From *The Code of Criminal Procedure of the State of Texas*, 1925, pp. 93–96)

Art. 602. *Jurors called.*—When a capital case is called for trial, and the parties have announced ready for trial, the names of those summoned as jurors in the case shall be called. Those not present may be fined not exceeding fifty dollars. An attachment may issue on request of either party for any absent summoned juror to have him brought forthwith before the court. (O.C. 555.)

Art. 603. *Sworn to answer questions.*—To those present the court shall cause to be administered this oath: "You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its direction, touching your service and qualifications as a juror, so help you God."

Art. 604. *Excuses.*—The court shall then hear and determine excuses offered for not serving as a juror, and if he deems the excuse sufficient, he shall discharge the juror.

Art. 605. *Claiming exemption.*—Any person summoned as a juror who is exempt by law from jury service, may, if he desires to claim his exemption, make an affidavit stating his exemption, and file it at

any time before the convening of said court with the clerk thereof, which shall be sufficient excuse without appearing in person. The affidavit may be sworn to before the officer summoning such juror. (Acts 1907, p. 216.)

Art. 606. *Excused by consent.*—One summoned upon a special venire may by consent of both parties be excused from attendance by the court at any time before he is impaneled.

Art. 607. *Challenge to array first heard.*—The court shall hear and determine a challenge to the array before trying those summoned as to their qualifications.

Art. 608. *Challenge to the array.*—Either party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds for such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained. This article does not apply when the jurors summoned have been selected by jury commissioners.

Art. 609. *When challenge is sustained.*—The array of jurors summoned shall be discharged if the challenge be sustained, and the court shall order other jurors to be summoned in their stead, and direct that the officer who summoned those so discharged, and on account of whose misconduct the challenge has been sustained shall not summon any other jurors in the case.

Art. 610. *List of new venire.*—When a challenge to the array has been sustained, the defendant shall be entitled, as in the first instance, to service of a copy of the list of names of those summoned by order of the court.

Art. 611. *Court to try qualifications.*—When no challenge to the array has been made, or if made, has been overruled, the court shall proceed to try the qualifications of those present who have been summoned to serve as jurors.

Art. 612. *Mode of testing.*—In testing the qualifications of a juror after he has been sworn, he shall be asked by the court, or under its direction:

1. Are you a qualified voter in this county and State, under the Constitution and laws of this State?

2. Are you a householder in the county, or a freeholder in the State?

If he answers both questions in the affirmative, the court shall hold him to be a qualified juror until the contrary be shown by further examination or other proof. (Acts 1st C.S. 1903, p. 16; Acts 1905, p. 207.)

Art. 613. *Passing juror for challenge.*—A juror held to be qualified shall be passed for acceptance or challenge first to the State and then to the defendant. Challenges to jurors are either peremptory or for cause.

Art. 614. *A peremptory challenge.*—A peremptory challenge is made to a juror without assigning any reason therefor. (O.C. 571.)

Art. 615. *Number of challenges.*—In capital cases, both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges. (Acts 1897, p. 12.)

Art. 616. *Reasons for challenge for cause.*—A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. It may be made for any one of the following reasons:

1. That he is not a qualified voter in the State and county, under the Constitution and laws of the State.
2. That he is neither a householder in the county nor a freeholder in the State.
3. That he has been convicted of theft or any felony.
4. That he is under indictment or other legal accusation for theft or any felony.
5. That he is insane or has such defect in the organs of seeing, feeling, or hearing, or such bodily or mental defect or disease as to render him unfit for jury service.
6. That he is a witness in the case.
7. That he served on the grand jury which found the indictment.
8. That he served on a petit jury in a former trial of the same case.
9. That he is related within the third degree of consanguinity or affinity to the defendant.
10. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to the private prosecutor, if there be one.
11. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime.
12. That he has a bias or prejudice in favor of or against the defendant.
13. That from hearsay or otherwise there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall

be discharged; if he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged.

14. That he cannot read and write. This cause of challenge shall not be sustained when it appears to the court that the requisite number of jurors who are able to read and write cannot be found in the county. (O.C. 575; Acts 1st C.S. 1903, p. 16; Acts 1905, p. 207.)

Art. 617. *Other evidence on challenge.*—Upon a challenge for cause, the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge. (O.C. 577.)

Art. 618. *Certain questions not to be asked.*—In examining a juror, he shall not be asked a question the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by some legal accusation with theft or any felony. O.C. 577.)

Art. 619. *Absolute disqualification.*—No juror shall be impaneled when it appears that he is subject to the third, fourth or fifth clause of challenge in Article 616, though both parties may consent.

Art. 620. *Names called in order.*—In selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant. Each juror shall be tried and passed upon separately. A person who has been summoned, but who is not present, may, upon his appearance before the jury is completed, be tried as to his qualifications and impaneled as a juror, unless challenged; but no cause shall be unreasonably delayed on account of such absence. (O.C. 556–558.)

Art. 621. *Judge to decide qualifications.*—The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon. (O.C. 579.)

Art. 622. *Oath to each juror.*—As each juror is selected for the trial of the case, the following oath shall be administered to him by the court, or under its direction: "You solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render, according to the law and the evidence, so help you God." (O.C. 563.)

Art. 623. *Jurors shall not separate.*—The court may adjourn veniremen to any day of the term; but when jurors have been sworn in a case, those so sworn shall be kept together and not permitted to separate until a verdict has been rendered or the jury finally discharged, unless by permission of the court, with the consent of each party and in charge of an officer. (O.C. 605.)

Art. 624. *Persons not selected.*—When a jury of twelve men has been completed, the others in attendance under a summons to appear as jurors in the case shall be discharged from further attendance therein.

Art. 625. *Special pay for veniremen.*—All men summoned on special venire who have been challenged or excused from service on the trial, and who reside more than one mile distant from the courthouse of the county, shall be paid, out of the jury fund, one dollar for each day that he attends court on said summons. No person shall receive pay as a special venireman and regular juror for the same day. No per diem shall, in any event, be allowed any venireman under this article, who resides within the corporate limits of the county seat, if incorporated, nor shall any per diem be allowed any venireman for more than one case the same day. (Acts 1907, p. 214.)

The Trial Before the Jury

(From *The Code of Criminal Procedure of the State of Texas*, 1925, pp. 99, 101–104)

Art. 642. *Order of proceeding in trial.*—A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.
2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.
3. The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof.
4. The testimony on the part of the State shall be offered.
5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by defendant's counsel.
6. The testimony on the part of the defendant shall be offered.
7. Rebutting testimony may be offered on the part of each party. (O.C. 580.)

Art. 643. *Testimony at any time.*—The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice. (O.C. 581.)

Art. 657. *Jury are judges of fact.*—The jury are the exclusive judges of the facts, but they are bound to receive the law from the court and be governed thereby. (O.C. 593.)

Art. 658. *Charge of court.*—In each felony case the judge shall, before the argument begins, deliver to the jury a written charge, distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sypmathy or excite the passions of the jury. Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and he shall present his objections thereto in writing, distinctly specifying each ground of objection. (Acts 1913, p. 278.)

Art. 659. *Requested special charges.*—Before the court reads his charge to the jury, counsel on both sides shall have a reasonable time to present written instructions and ask that they be given to the jury. The court shall give or refuse these charges with or without modification, and certify thereto; and, when the court shall modify a charge it shall be done in writing and in such manner as to show clearly what the modification is. (Id.)

Art. 660. *Final charge.*—After the judge shall have received the objections to his main charge, together with any special charges offered, he may make such changes in his main charge as he may deem proper, and the defendant or his counsel shall have the opportunity to present their objections thereto and in the same manner as is provided in Article 658, and thereupon the judge shall read his charge to the jury as finally written, together with any special charges given. After the argument begins no further charge shall be given to the jury unless required by the improper argument of counsel or the request of the jury, or unless the judge shall, in his discretion, permit the introduction of other testimony, and in the event of such further charge the defendant or his counsel shall have the right to present objections in the same manner as is prescribed in Article 658. The failure of the court to give the defendant or his counsel a reasonable time to examine the charge and specify the ground of objection shall be subject to review either in the trial court or in the appellate court. (Id.)

Art. 661. *Charge certified by judge.*—The general charge given by the court and all special charges given or refused shall be certified by the judge and filed among the papers in the cause. (O.C. 595.)

Art. 662. *Charge in misdemeanor.*—The court is not required to charge the jury in a misdemeanor case, except at the request of counsel on either side. When so requested he shall give or refuse such charges, with or without modification, as are asked in writing. (O. C. 598.)

Art. 668. *Separation of jury.*—After the jury has been sworn and impaneled to try any felony case, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer. (O.C. 605.)

Art. 674. *Written evidence.*—The jury may take with them any writing used as evidence. (O.C. 610.)

Art. 675. *Foreman of jury.*—Each jury shall appoint one of their body foreman. (O.C. 611.)

Art. 676. *Jury may communicate with court.*—When the jury wish to communicate with the court, they shall so notify the sheriff, who shall inform the court thereof; and they may be brought before the court, and through their foreman shall state to the court verbally or in writing, what they desire to communicate. (O.C. 612, 613.)

Art. 677. *Jury may ask further instruction.*—The jury, after having retired, may ask further instruction of the judge as to any matter of law. For this purpose the jury shall appear before the judge in open court in a body, and through their foreman shall state to the court, verbally or in writing, the particular point of law upon which they desire further instruction; and the court shall give such instruction in writing, but no instruction shall be given except upon the particular point on which it is asked. (O.C. 614.)

Art. 678. *Jury may have witness reëxamined.*—If the jury disagree as to the statement of any witness, they may, upon applying to the court, have such witness recalled, and the judge shall direct him to repeat his testimony as to the point in dispute, and no other, and as nearly as he can in the language he used on the trial. (O.C. 615.)

Art. 679. *Presence of defendant.*—In felony but not in misdemeanor cases, the defendant shall be present in the court when any such proceeding is had as mentioned in the three preceding articles, and his counsel shall also be called.

Art. 680. *If a juror becomes sick.*—After the retirement of the jury in a felony case, if any one of them becomes so sick as to prevent the continuance of his duty, or any accident or circumstance occurs to prevent their being kept together, the jury may be discharged. (O.C. 618.)

Art. 681. *Discharging jury in misdemeanor.*—If nine of the jury can be kept together in a misdemeanor case in the district court, they shall not be discharged. If more than three of the twelve are discharged, the entire jury shall be discharged. (Acts 1876, p. 82.)

Art. 682. *Disagreement of jury.*—After the cause is submitted to the jury, they may be discharged when they cannot agree and both parties consent to their discharge; or the court may in its discretion

discharge them where they have been kept together for such time as to render it altogether improbable that they can agree. (O.C. 619.)

Art. 683. *Final adjournment discharges jury.*—A final adjournment of the court before the jury have agreed upon a verdict discharges them. (O.C. 620.)

Art. 684. *Discharge without verdict.*—When a jury has been discharged, as provided in the four preceding articles, without having rendered a verdict, the cause may be again tried at the same or another term. (O.C. 621.)

Art. 685. *Court open for jury.*—The court during the deliberations of the jury may proceed with other business or adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury.

The Verdict

(From *The Code of Criminal Procedure of the State of Texas*, 1925, pp. 104–106)

Art. 686. *"Verdict."*—A verdict is a written declaration by a jury of their decision of the issues submitted to them in the case.

Art. 687. *Verdict in felony.*—Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman.

Art. 691. *Polling the jury.*—The State or the defendant shall have the right to have the jury polled, which is done by calling separately the name of each juror and asking him if it is his verdict. If all, when asked, answer in the affirmative, the verdict shall be entered upon the minutes; but, if any juror answer in the negative, the jury shall retire again to consider of their verdict. (O.C. 624.)

Art. 692. *Presence of defendant.*—In felony cases the defendant must be present when the verdict is read unless his absence is wilful or voluntary. A verdict in a misdemeanor case may be received and read in the absence of the defendant. (Acts 1907, p. 31.)

Art. 693. *Verdict must be general.*—The verdict in every criminal action must be general. Where there are special pleas upon which the jury are to find, they must say in their verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, they must find that the defendant is either "guilty" or "not guilty," and they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty. (O.C. 626.)

Art. 694. *Offenses of different degree charged.*—In a prosecution for an offense including lower offenses, the jury may find the defendant not guilty of the higher offense, but guilty of any lower offense included. (O.C. 630.)

Art. 695. *Offenses consisting of degrees.*—The following offenses include different degrees:

1. Murder, which includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder.

2. An assault with intent to commit any felony, which includes all assaults of an inferior degree.

3. Maiming, which includes aggravated and simple assault and battery.

4. Burglary, which includes every species of house breaking and theft or other felony when charged in the indictment in connection with the burglary.

5. Riot, which includes unlawful assembly.

6. Kidnapping or abduction, which includes false imprisonment.

7. Every offense against the person includes within it assaults with intent to commit said offense, when such attempt is a violation of the penal law. (O.C. 631.)

Art. 696. *Informal verdict.*—If the verdict of the jury is informal, their attention shall be called to it, and, with their consent the verdict may, under the direction of the court, be reduced to the proper form. If the jury refuse to have the verdict altered, they shall again retire to their room to deliberate, unless it manifestly appear that the verdict is intended as an acquittal; and, in that case, the judgment shall be rendered accordingly, discharging the defendant.

Evidence in Criminal Actions

(From *The Code of Criminal Procedure of the State of Texas*, 1925, p. 107)

Art. 706. *Jury are judges of facts.*—The jury, in all cases, are the exclusive judges of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence. (O.C. 643.)

Art. 707. *Judge shall not discuss evidence.*—In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceedings previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case.

AFFIRMATIVE MATERIAL

I. Inefficiency of Trial by Jury

THE PETTY JURY

BY W. F. WILLOUGHBY

(From *Principles of Judicial Administration*, pp. 488–494, 497–511, The Brookings Institution, Washington, 1929)

Adaptation of the petty jury system to modern conditions.—It is one thing to recognize the merits of a political institution as representing an advance over those which have preceded it and as meeting the conditions that prevailed at the the time of its rise and development, and quite another to justify its continued maintenance after those conditions have passed away and new ones quite dissimilar have taken their place. The maintenance of the jury system at the present time must be justified, therefore, not on historical grounds, but upon its positive merits as an institution adapted to present conditions.

In considering this question from this purely utilitarian or practical standpoint, certain distinctions should be made. These may be stated in the form of questions: Is the system as viewed in its fundamental aspects one that should be retained in its substantial integrity, or should it be entirely abolished? Or, second, if retained, should substantial modifications be made in it; and if so, what form should these modifications take? In considering both of these questions the further distinction should be made between the retention, abolition, or modification of the system as employed in the administration of civil justice and the administration of criminal justice. It may well be that the system can continue to prove an efficient instrument in the one case and not in the other, or that the modifications found desirable will apply in one and not the other. The order in which these questions will be considered is that of their statement. An evaluation of the system as a whole should first be sought before an attempt is made to consider the features in respect to which it may with advantage be modified.

Retention or abolition of the petty jury in civil cases.—As an historical institution which has rendered valuable service, the burden of proof rests upon those advocating the abolition of the jury system. Viewed from the standpoint of its technical character, it is fair to say that the reverse is the case. If a people were starting anew, uninfluenced by historical attachments and sentimental considerations, free to devise that system for the administration of justice which it

believed would give the best results in practice, it is hardly conceivable that it would deliberately create such an institution. Stated baldly, the use of the petty jury means that matters requiring adjudication, instead of being submitted to professional experts, trained in the performance of their duties and acting under a continuing responsibility, are handed over to a body of laymen, selected almost at random, regarding whose ability to perform the delicate function of weighing evidence free from sentimental and emotional influences nothing is known, and who perform their duties under no sense of continuing responsibility. It is, furthermore, a system which complicates and renders more difficult the process of adjudication, entails great expense to the government, and imposes a heavy burden upon the citizen body. A system which represents such a radical departure from normal or accepted methods of handling public business and presents such disadvantages, is surely one the use of which should be supported by affirmative proof of merits that more than offset its failings. It is believed that it is difficult to produce such proof.

A cold analysis of the problem of the administration of justice reveals certain essential considerations that must be met if the system for securing it is to be satisfactory.

The first is that the proper adjudication of controversies requires the exercise of a very special faculty, usually described as the judicial temperament. By this is meant the ability to disentangle the essential from the unessential, to discover the real issue that is presented, to weigh the evidence presented in a detached way, to eliminate matters of sentiment, to be impervious to mere emotional appeals, and to make decisions conforming to the law and the facts as developed and their bearing on the controversy ascertained. It does not need the studies of psychologists to establish the fact that this faculty is not a common possession, that it is one that is acquired only as a result of experience and by persistent self-drill in making action conform to such requirements. The decision of controversies is thus a task requiring specially selected and specially trained experts.

Secondly, persons entrusted with such responsibility as that of determining individual rights should be required to perform their duties under a system of continuing responsibility, where their standing in the community and in their profession, if not their continuance in office, is dependent upon the honesty and ability with which they discharge their duties.

A third consideration is that the work of adjudication should be performed with dispatch, involve the minimum of technicalities, and entail as little burden of expense upon the government, the litigants, and the general public as is consistent with certainty and justice to all parties concerned.

No one of these requirements is met, even in measurable degree, by the jury system. The defects of the ordinary jury from the standpoint of intellectual attainments, ability to disentangle complicated issues, capacity to weigh evidence of varying degrees of credibility, and power to resist appeals to their emotions are appreciated by all, and find express recognition in the numerous technical rules determining the competency of witnesses and evidence that may be produced. Only in the most general and temporary way is the factor of responsibility present. And it would be difficult to devise a system that would be more productive of trouble, expense, and delay.

Technically considered, therefore, the jury system is defective, and all the arguments from this standpoint are in favor of the alternative system where complete responsibility for the determination of matters both of fact and the law and the rendering of the decision is vested in a permanent trained bench. As Mr. Charles A. Boston puts it, in his excellent article on "Some Practical Remedies for Existing Defects in the Administration of Justice":

"We train recruits to bear arms, we license lawyers, physicians, dentists, midwives, veterinarians, horseshoers, and chauffeurs, but so long as a man speaks any sort of English, can hear, is on the jury list and has not formed an opinion, he is deemed a competent man to decide disputes in a court of justice. He would not be accepted to run a street car, nor to perform any number of ordinary duties for a private employer, but he is legally a fit juryman if he has these qualifications.

"The true, but not the legal essentials of a competent juryman considering his actual functions, are the ability to listen attentively, to remember testimony, to weigh evidence, to understand instructions upon the law, to argue and give heed to argument, and to unite in pronouncing a reasoned verdict, applying law as instructed to facts as ascertained. In any other vocation, this would be deemed to call for training and experience; these demands require for their efficient exercise, a high degree of mental development, involving attention, memory, observation, reflection, apprehension, understanding, judgment, and reason; but we find no such requirement upon any statute book or in any decision. . . . In short, we recognize in every imaginable way that the jury is the weakest element in our judicial system and yet we pander to it as a sacred institution. It causes more miscarriages of justice and is the occasion of more appeals, reversals and delays than any other element in our system. . . .

"One of the prime elements of an efficient judicial tribunal is impartiality and freedom from prejudices and yet it is proverbially admitted that before an average jury in a negligence case a corporation stands less chance of judgment on the merits than an individual,

an employer than an employee, a religious opponent than a co-religionist, a member of a different race from a member of the same race. . . .

"We hear much of the technicalities of the law defeating justice; the most of these technicalities have grown up and exist in a vain endeavor to prevent juries from defeating justice."

In the foregoing no attempt has been made to set forth and employ as arguments against the jury system the many evils which characterize this system in its practical operation. These relate to the extent to which there is what amounts to a process of adverse selection in the selection of men for jury service, with the result that the ordinary jury is composed of men relatively low in order of intelligence and with meagre capacity to exercise a discriminating judgment; the extent to which juries are deliberately "packed" in the interest of one of the parties; the extent to which use is made of "professional" jurors; the extent to which juries are "tampered" with; the extent to which jurors are not only unconsciously influenced by race, religion, class, and other prejudices, but deliberately allow such factors to influence their verdicts; the intolerable delay that often occurs in the selection of juries, etc. All of these evils are not inherent in the system and conceivably may be abated, if not entirely removed, by appropriate provisions to govern the jury system in operation. All that will be sought in the paragraphs that follow will be to determine whether the jury system, even if operating with maximum efficiency, is one that represents a desirable feature of a system of judicial administration under political and social conditions now obtaining.

It should not escape notice that those in favor of the retention of the jury system must hold as a part of their argument that the system of trial by the judge alone is one that will not give satisfactory results from the standpoint of the protection of the individual in his rights and the promotion of the public welfare. This it is difficult to do in the light of the fact that this non-jury system is in successful operation as regards many classes of litigation in this country, and is being employed to an increasing extent in those countries, such as England and her Dominions, which have had experience with both systems. As Chief Justice William H. Taft has said in his commencement address on "Criminal Law," at Yale University, in 1905:

"In suits in equity the judge hears and decides the issues of fact. The issues may be, and often are, very similar to those arising in suits at common law, the genuineness of a signature, the existence of fraudulent motive, the identity of an individual, damages to business by violation of patents, trade marks or contract rights, and all the variety of issues presented in civil litigation. Now the federal constitution requires that such issues arising at common law shall be

tried by a jury, but if an equity suit the court may try them. Since the abolition of the distinction between law and equity in civil actions in our codes of procedure, it requires a lawyer to tell whether a suit brought is in equity or law. Certainly a constitutional mandate that requires a jury in less than half the civil issues, and only in those when in a certain form of action, distinguishable only by a lawyer, can hardly be said to rest on any very broad and sound principles. Of course, in suits for personal injury against corporations, the plaintiff relies on the supposed sympathy of twelve laymen with the poor plaintiff against the rich corporation both to find the facts in favor of the plaintiff and also to swell the damages to a large sum. But this hardly constitutes a reason for maintaining the jury in a system which is supposed to dispense justice to all whether rich or poor—impartially. The abolition of the jury in civil cases would relieve the public of a great burden of expense, would facilitate the hearing of all civil suits and would not, I think, with proper appeal deprive any litigant of all he is entitled to, an impartial hearing."

In England, the home of the petty jury, its use has greatly declined in recent years; and all parties, the bench, the bar, and the public are in accord that in nowise have the safeguards of individual rights been weakened or the due administration of the law suffered.

In Ontario, where the judicial system is modelled on that of England, large discretionary powers are exercised by the judge in determining whether a civil action shall be tried with a jury. Justice W. R. Riddell of the Supreme Court of Ontario gives the following interesting account of the conditions governing the use of a jury in that province:

"A party who wishes his case tried by a jury files a jury notice—the other side may move to strike it out. It will be struck out in chambers if the judge sitting in chambers thinks it is a case that ought not to be tried by a jury upon the face of it. Usually, however, a different course is pursued and the matter is left to the trial judge: I go on circuit, say, as I have done many times and hope to do again. The records containing the pleadings are laid before me; I go through the records one by one and determine which, if any, of the cases for which a jury is asked should really be tried with a jury. Counsel may be heard; and as a rule, in a very few minutes we have determined in which cases a jury is proper. In all the other cases the jury notices are struck out and they are placed at the end of the list with the cases to be tried without a jury (this applies only to civil cases). . . .

"The percentage of cases tried by a jury is constantly diminishing—the last time I had occasion to look into the matter at all closely, I found that about twenty per cent were so tried in the Supreme

Court, about fifteen per cent in the County Court, and not one-fifth of one per cent in the Division Court.

"While technically there is an appeal from the action of a trial judge in striking out the jury, I have, in more than thirty years experience known of only two appeals being actually taken on this ground, both of them unsuccessful—I know of one case, however, in which an appeal taken on other grounds succeeded and the Appellate Court directed the jury notice to be restored.

"In an address before the Illinois Bar Association, May 28, 1914, I used the following language in reference to our practice:

"The saving of time—and wind—is enormous, the opening and closing of speeches of counsel to the jury and the charge of the judge are done away with; in argument there are very few judges who care to be addressed like a public meeting and quite a few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks upon witnesses or parties, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover, during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimized before a judge."

THE JURY SYSTEM

BY J. M. MATHEWS

(From *American State Government*, pp. 466–472, D. Appleton and Company, Publishers, New York, 1926)

Among the most serious difficulties, however, in the way of efficiency in the administration of punitive justice are the requirements of indictment by a grand jury and conviction by unanimous verdict of a petit jury. Although the grand jury may sometimes be useful in compelling the attendance of witnesses and examining them under oath, and in supporting the public prosecutor in proceeding against powerful malefactors, it is nevertheless on the whole an inefficient and cumbersome body composed of untrained and irresponsible laymen. This inefficiency and cumbrousness is shown in the mistakes which the grand jury makes in selecting the cases to be tried and in failing to examine at all many cases in which true bills should probably be returned. It is said that, in 1911, the grand jury in Chicago released without a hearing 28 per cent of those held on felony charges. Furthermore, the necessity of waiting for grand jury action is one of the most potent causes of delay in criminal proceedings. A remedy for

this condition of affairs has already been found in some states where crimes are prosecuted by means of informations prepared by the prosecuting attorney. This increased power of the local prosecuting attorney, however, should be accompanied by an increased degree of central control over him.

A more serious obstacle, however, to efficient law enforcement through court action is found in the system of trial by jury. The difficulties involved in the jury system arise, first, from the method of selecting juries, and, secondly, from the extent of the powers which they exercise. Juries are still selected from the vicinage, though the reason for the rule has long since disappeared. The original reason for this rule was in order that the jury should be composed of men having personal knowledge of the facts, but now jurors who know the least about the alleged crime are most apt to be selected. As already noted, the defendant may, under certain circumstances, secure a change of venue, but the trial judge should be empowered to allow the same privilege to the prosecution, under equally justifiable conditions, in spite of the objection of the defendant. From whatever locality the jurors may be selected, partisan political considerations should not be allowed to enter into the choice, and, to this end, the selection should be taken out of the hands of the sheriff and vested in an impartial commissioner appointed by the judges or by central authority. Under the system in which the sheriff draws the grand and petit juries, men are sometimes selected with a view to the protection of offenders having political influence, and not to return indictments or verdicts. In order to remedy this state of affairs, jury commissioners have been provided in some states through judicial selection or appointment by the governor. Thus Maryland, by an act of 1904, vested in jury commissioners appointed by the governor the power previously possessed by sheriffs to select jurors. Such acts have been held not unconstitutional as an infringement upon the prerogatives of the judiciary.

Even where partisan political considerations have been eliminated, however, it does not follow that an intelligent and capable jury will be selected. In some states the jury panel is drawn by lot or blind chance, and there is no assurance that the least qualified persons in the county may not be selected. Even where character and intelligence are taken into account as far as possible in selecting the panel, the actual trial jury is apt to be composed of persons of but mediocre intelligence and standing in the community. Members of certain professions and persons who would be seriously injured financially by jury service are frequently exempted from that duty, thus eliminating a large proportion of the intelligent and well-to-do residents of the community. This process of elimination is carried a step further through the practice of challenging jurors, either peremptorily or for

cause. Persons who have formed some opinion of the case through reading newspaper accounts of it are usually challenged, thus further eliminating the most intelligent class. In this connection it may be noted that the defendant is specially favored by the provision usually found whereby a greater number of challenges are allowed to the defense than to the prosecution.

Not only the method of selecting the jury but also the mode of its operation after selection places obstacles in the way of the efficient administration of justice. It has frequently been noted that, in our state courts as compared with the English courts or even with the Federal courts, the powers and functions of the judge are of less importance in determining the course of the trial. The judge should not be reduced to a mere figurehead, for presumably his greater experience and discrimination in weighing evidence than any jury possesses should qualify him to serve as a guide and mentor to the jury. The exercise of his normal powers to instruct the jury, to summarize and comment on the evidence and to direct the trial in general should be of great service to the jury in reaching a just verdict, and should remain unimpaired. In practice, however, these normal powers of the state judge are greatly restricted. The impotence of the judge is even further accentuated by the provision found in some half a dozen states, to the effect that juries shall be judges of the law as well as of the facts in criminal cases. In such cases, however, the power of the jury is in practice not always as great as this provision might seem to indicate, for it has been held that, under this provision of the criminal code, it is not improper for the court to tell the jury that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so"; but that "before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court."

A relic of former times still embedded in the jury system is the rule requiring that the verdict be unanimous. This rule not infrequently causes a trial to miscarry through a failure of the jury to agree, and thus necessitates a new trial with the attendant expense and delay. Except, perhaps, in capital cases, there would seem to be no good reason why juries should not be allowed to reach verdicts by a majority of three-fourths vote, as is already allowed in some states. The unanimity rule makes it especially difficult to enforce the law in those portions of the state in which public sentiment is opposed to the enforcement of the law. This would doubtless also frequently be true so long as the jury system is retained, no matter what the vote required to reach a verdict. "A flagrant example of the 'lawlessness' of jurors in Illinois and of the impotency of judges under such a system to prevent outright nullification of the law was recently afforded in Chicago, where thirteen different juries, in the

face of incontrovertible evidence, refused to convict saloon-keepers for violating the Sunday closing law, thus presenting an example of a complete breakdown in the machinery of law enforcement." We thus have a system of "jury-made lawlessness, which recognizes rights that are forbidden by law and denies rights that are granted by law."

In homicide cases many defendants are acquitted by the jury in the face of overwhelming evidence. It is well known that in lynching cases it is often practically impossible to secure convictions by juries. It is difficult in the first place to apprehend members of a lynching party, even though the affair be perpetrated in broad daylight by unmasked men. Coroners' juries impaneled to hold an inquest over the bodies of persons lynched, frequently bring in a verdict that the deceased came to his death at the hands of persons unknown. Often this is the end of the matter, as in the celebrated Frank case in Georgia in 1915. But even if the persons who perpetrated the deed are known and can be apprehended, the attempt to try them by a jury of the vicinage is apt to be a farce. "The case of State v. Hughes, charged with participating in a lynching, came up in DeKalb County, Tennessee, in July, 1902, but it was found impossible to get a jury to try the case. The court exhausted a venire of three hundred and fifty, and found every man in the lot disqualified—probably having themselves aided in the affair." In 1912 a negro who had killed a special policeman was burned to death by a mob at Coatesville, Pennsylvania. Fourteen of the alleged lynchers were indicted, seven of them were tried, and the evidence against them appeared to be conclusive, but all seven were found not guilty by the jury, and the prosecuting attorney thereupon asked for the dismissal of the other seven cases.

The inefficiency of the jury system is thus one of the most serious obstacles in the way of enforcement of state law. It is recognized by public prosecutors that their success in securing the enforcement of state laws that may be obnoxious to public sentiment in their localities depends upon avoiding jury trials as far as possible. One great cause of the failure to enforce the laws against disorderly houses found on the statute books of nearly every state has been the necessity of depending for convictions upon incompetent and even perhaps corrupt juries. In order to avoid this necessity, former Attorney-General Cosson of Iowa drew up and in 1909 secured the enactment by the legislature of that state of a law which has become known as the Iowa Injunction and Abatement Law, and has since been enacted in a number of states. This law avoids the necessity of a jury trial by substituting therefor the action of the equity branch of the courts. It virtually attempts to secure the enforcement of a criminal law by a civil action, permitting proceedings in equity in the name of the

state to abate as a nuisance a building used as a disorderly house, and has been upheld as constitutional.[1]

The action to enjoin and abate the nuisance may be brought by the prosecuting attorney or by a citizen or taxpayer. It has already been considerably used, particularly in Iowa. Its effectiveness consists principally in that, as an equity proceeding, the trial is before a judge instead of a jury, and in that either party has a right of appeal instead of the defendant alone, as in criminal cases. "The justification," says ex-Attorney-General Cosson, "for doing away with the jury system in matters of this nature, and seeking the injunctive remedy, a proceeding in equity, is bottomed upon the fundamental fact that the state which passes the law inherently has and ought to have the power to enforce that law. The injunctive remedy gives to the state this right, and no other method has yet been devised which so effectively gives to the state this power to enforce its own statutes, and yet at the same time violates none of the fundamental rights of the defendant."

INEFFICIENCY OF THE JURY

(From *Editorials of the Month*, Houston, Texas, June, 1930, p. 262)

Source of our trouble.—In the opinion of many Texas editors, our trial courts are not going to function properly—that is, as courts of justice—until our system of selecting jurors is changed. Judge C. A. Pippen, of Dallas, is quoted by several Texas newspapers as saying that "it is a curse in the administration of justice the way we get our jurors."

Certain editors have heretofore been quoted as authority for the statement that an "intelligent" man can not qualify for jury duty. This time the full extent of the "travesty of jury selection" is pictured by the editor of the Wichita *Times*, who said:

"During the examination of veniremen (in a case at Dallas), one of them was asked 'if he had any prejudice against the offense of murder.' The individual who is without such prejudice is certainly unfit to be a juror. Yet to admit such prejudice would probably result in a challenge by the defense. That is a fair sample of the workings of the jury system."

The hopelessness of the jury system is pointed out by the San Angelo *Standard* in this humorous quip:

"Hanging is obsolete in Texas, but this does not apply to juries. They hang up about as often as murder cases come to trial, and there are half a dozen such cases in Texas this week."

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[1]See, for example, State v. Fanning, 47 N.W. 215; State v. Gilbert, 147 N.W. 953, relying on 121 Iowa 482, and 196 U.S. 279.

It would be amiss, however, to assume that editors hold juries responsible for all the miscarriages of justice. There are, for instance, certain inconsistencies in the law which demand correction. The Uvalde *Leader* calls attention to these defects in the statutes with a very pointed quotation:

"If you shoot and kill a man in sudden anger the maximum penalty in Texas is five years—but if you MISS him you can be given fifteen years."

Unless Texas lawmakers consider poor marksmanship a greater crime than murder, it is quite obvious that a revision of the state's criminal statutes would be very much in order. In this connection, it is interesting to note that a new criminal code will be offered Texas' next Legislature. Such a code, according to the Dallas *News*, will be available for consideration by the 42d Legislature. The *News* notes, further, that its favorable consideration is urged upon the new legislature by judges, lawyers, and "the long suffering public."

The influence upon young people is already apparent, according to the Albany *News*, which says:

"Just a few years ago it was a very rare thing to see a boy or girl brought into court, and a very rare occurrence for a woman to be dragged into court. But today the court dockets are jammed with criminal cases. . . ."

So long as jurors are selected because they hold no intelligent opinions, and so long as judges are permitted to disregard their solemn responsibilities, conditions such as those painted by the Albany *News* will prevail. That, in short, appears to be the consensus of newspaper opinion—that, and the fact it is high time something should be done about it.

(From *Editorials of the Month*, Houston, Texas, June, 1930, p. 269)

As might be expected, Sherman's resort to mob law again brought forth discussion of the causes which lie back of mob formations. Various shades of editorial opinion upon this subject were presented in the January number of *Editorials of the Month* (see pp. 15–16). The debate there presented was occasioned by the Eastland lynching. In the present case, the Wichita Falls *Times* places responsibility upon fear of legal delays in disposition of the prisoner's case, and makes an interesting comparison. Witness:

"Lynch law is never justified. Sometimes, however, there is more apparent justification for it than at other times. At Eastland last winter, for instance, the victim was a man of whose guilt there was no doubt, but whose case had dragged interminably through the

courts, and who stood a fair chance of avoiding the just penalty. The public's patience had worn to the snapping point.

"The situation at Sherman last Friday was quite different. The prisoner was being brought to trial in exceptionally quick time. There was no reason to doubt that justice would expeditiously be done.

"And yet, in both the Eastland and the Sherman cases, there is something of the same feeling in the minds of those who formed the mobs. It was a feeling of disgust at, and distrust of, the law's devious ways. Lack of confidence in the courts was the motivating force, in each instance. At Eastland, that lack was due to what the mob had read and seen. At Sherman it was due to what the mob expected.

"Probably we shall never again see such a frightful display of the mob spirit as was witnessed at Sherman, but that spirit will flare up again and again, as long as Texas courts are what they are."

CRIMINAL LAW—WHAT'S WRONG WITH IT?

BY CHARLES S. POTTS

Dean of School of Law, Southern Methodist University, Dallas, Texas

(From *The Dallas Morning News Reprints*, No. 1 of a series of fifteen articles on Texas Criminal Procedure, published in the Dallas *Morning News*, Dec. 26, 1928–Jan. 9, 1929, p. 19.)

As is often the case, however, the pendulum has swung too far. The courts have held, not only that the defendant can not be made to take the stand and testify, not only that no inference of guilt may be drawn from his failure to testify, but that it is reversible error for the judge, or the prosecutor, or even the jurors in their deliberations, to refer, either directly or indirectly, to the fact that the defendant had failed to take the stand in his own behalf. In one case our higher court held that it was reversible error for the prosecuting attorney in his closing argument to tell the jury that nobody had denied a certain line of testimony, because, said the court, such a statement would remind the jurors of the fact that the defendant had not taken the stand.

Surely we have gone farther than is necessary to go in our attempt to protect the accused from self-incrimination. We are here trying to compel the jurors to do the impossible—not to give weight to the fact that the defendant, the one person who knows all about his connection with the transaction, if any, sits silent throughout the trial. They may not be permitted to speak of the matter with fellow-jurors, but doubtless every intelligent man on the jury finds the question constantly shaping itself in his mind, "Why did he not testify?"

On this point Arthur C. Train, author of "The Prisoner at the Bar," and himself an experienced lawyer, says:

"Three jurors out of five will convict any man who is unwilling to offer an explanation of the charge against him. How they reconcile this with their oath it would be hard to understand, if they were accustomed to obey it literally in other respects. The writer has heard more than one talesman say, in discussing a verdict, 'Of course, we couldn't take it against him, but we knew he was guilty because he was afraid to testify.' "

TRIAL BY JURY: AN INEFFECTIVE SURVIVAL

BY BRUCE G. SEBILLE

(From *The American Law Review*, Vol. LIX, Jan.-Feb. 1925, pp. 67–73, Review Publishing Company, St. Louis, Mo., 1925)

NOTE: This article may be borrowed from the Extension Loan Library of The University of Texas.

ABOLISH THE JURY

BY J. C. McWHORTER

(From *The American Law Review*, Vol. LVII, Jan.-Feb., 1923, pp. 45–47; 51–52; 53–56. Review Publishing Company, St. Louis, Mo.)

Also, see Reference Shelf, Vol. V, No. 6, "Jury System," p. 156, H. W. Wilson Company, New York.

NOTE: The Reference Shelf is loaned to any member-school by the Extension Loan Library of The University of Texas.

II. *Necessity of Trial by Jury*

SHOULD TRIAL BY JURY BE ABOLISHED?

BY HAL W. GREER, Beaumont, Texas

(From *The American Law Review*, Vol. XLII, January-February, 1908, pp. 193–199, Review Publishing Company, St. Louis, Mo., 1908)

. . . . trial by jury in England was not inaugurated for the purpose of changing, avoiding or detracting from the law justly and impartially administered, but for the purpose of preventing persecution, without law, by the sovereign, the peers, and the King's officers. It was intended as a relief against oppression, not as an excuse for actual crime; the outgrowth of lawful defense against the whims and animus of individuals, not as the license to emotional sympathy for a red-handed murderer, or a sneaking thief. The system of common law grew up in opposition to crown persecutions and tyrannies. At first a jury, as officers of the court, traveled with the judge to the various "assizes"—subsequently this was changed so as to select "a jury of the vicinage."

None of these reasons apply to this country, for there never has been during the life of the Republic, any sovereign or peer, or ruling class, having the desire to oppress individuals among the people, without law, and none with power to do so, if they have had the desire, because, at the expense of repetition, our law exactly defines every crime, and affixes its punishment.

No necessity for a trial by jury, after our successful revolution against England, has ever existed because the reasons for devising, or calling the system into practice in that country, have never been experienced. England has undergone evolution from an absolute monarchy to comparative freedom for its people by gradual processes never experienced by us.

It must be remembered that our forefathers, who framed our Constitution had just thrown off the yoke of a King, with the experience and memory of his persecutions fresh upon them, and that jury trials were the bulwarks against such persecutions. It must be remembered also, that the lawyers who assisted in framing the Constitution, were all students under the English law, having its first impressions fastened in their minds. It should be further borne in mind, that their new Republic was to them an experiment, which they were by no means sure would last; and they could not foresee that the people would grow into the characteristics which would never permit a bold, adventurous tyrant to use the presidency as a stepping stone to monarchy.

For all these reasons, and many others not necessary to state, they incorporated out of superabundant caution, the right of trial by jury into the organic law, little dreaming that thereby they were permitting the driving of the entering wedge that would confuse, weaken, and ultimately destroy the law itself.

While a jury trial at law in the Circuit Courts of the United States is a right *per se*, and can only be waived by both parties in writing, and while in criminal cases in the United States District Courts, the verdict of the jury is conclusive, if the defendant is acquitted; yet the judges thoroughly dominate and control them, and the juries are more careful, perhaps more conscientious, in applying and preserving the law, than in state courts where they have greater latitude and are supremely independent in applying their inaccurate understanding of the law to the facts.

Thirty-five years' practice at the bar convinces me that juries are slowly, but surely, losing respect for state courts, as well as the law, and are becoming more and more aggressive in placing their own interpretation on the law, and less and less attentive to the rulings of the Court, as well as the charge of the trial judge, defining the law of the case.

The extreme deference shown them by the judge and subordinate officers of the court; the constant effort to consult their wishes,

comfort and convenience; the great adulation and flattery shown them by shrewd attorneys; these and innumerable other court incidents tend to create in their minds an exaggerated self-importance, and a corresponding loss of respect for the trial judge, the officers of court, and the attorneys before them. Many lawyers, in rural districts, will recall having heard trial judges sometimes submit to a vote of the jury the adjourning of court for the day, and the like, making his judicial dignity appear ridiculous, though greatly enhancing his popularity for another election.

Of course it is their right to be treated with the kindly courtesy always due from man to man; but not with sycophantic flattery and adulation—that is never due any man or set of men, and always works harmfully when practiced; and certainly every judge should honorably, justly, fairly, and masterfully preside over his court and its proceedings, to uphold respect for the law epitomized in his person.

With this prelude, I state my objections to trial by jury as follows:

In criminal cases.—First. They do not apply the exact definitions of crimes given in charge by the court because: (1) they do not understand them, for it requires a student of the law itself to do so; (2) they do not care to understand them, because the conduct of the trial convinces them they are supreme, and have the right to consult their own whims, instead of such definitions.

Second. They read into the law their own emotions, sympathies and feelings, giving it: (1) their own interpretation, which will "neither excuse nor justify" the crime from a legal point of view; (2) "putting themselves in the place of the defendant," a position never contemplated by either the law or good morals.

Third. Sometimes (though this is extraordinarily seldom) they are corrupted either through fear, or worse motives, and return a verdict in defiance of the law.

Fourth. Their verdicts are often rendered upon prejudice, though they may not be conscious of it at the time; for instance, the "reasonable doubt" is nearly always disregarded where a tramp or pauper is defendant, and they put on him the burden of proving his innocence; whereas as against a well-to-do citizen, tried on practically the same charge, the "reasonable doubt" is stretched into most unreasonable excuses for acquittal.

Fifth. The method of selecting a jury in criminal cases, particularly those punishable with death, is childish and puerile; for the corrupt juror, or one who can be or has already been "influenced" improperly, will answer all questions qualifying himself, as he has no conscience to stultify; whereas the conscientious juror is sure to be inveigled into admitting he "has formed or expressed an opinion," or "is biased or prejudiced in favor of or against the defendant," or

the like. Now a man who is truthful and honorable enough to admit that he has formed or expressed an opinion (unless he is doing so falsely to escape unpleasant jury service), or has a prejudice in the matter, will most probably be conscientious in observing his oath "to try the case according to the evidence submitted under the rulings of the court, and the law as given in charge by the court," and no more reason can be had for rejecting him on such grounds than for rejecting the *nisi prius* judge, or the judges of appellate courts, who have read accounts of the crime in the newspapers.

Sixth. The whole effort of the defendant's counsel is to keep his client from being tried by men known to be in favor of enforcing the law, and who cannot be appealed to, to violate their oaths and try the case upon emotions, feelings or sentiments the law does not recognize.

Seventh. The law itself is conscious of the fact that jurors can be improperly "influenced," in that in felony cases, they are practically held under arrest during the trial, and not allowed to go to their homes or otherwise pursue their normal habits. Imagine a conscientious, honest man thus held under surveillance in durance vile! Imagine the trial judge so held!

Eighth. The defendant's attorneys will make statements and arguments(?) appealing to the passions and prejudices of the jurors to directly violate their oaths and acquit the defendant, which they would not dare to make to the trial judge. *E.g.* Mr. Clarence Darrow's speech in defence of Haywood: "To hell with the Constitution and statute law," etc., as standing in the way of the laboring man's supposed rights. No doubt his speech was widely read by members of labor organizations, and created in their minds the belief that such organizations were justified in committing murder or any other crime to protect and foster their unions.

Ninth. As the law applied to crime is an exact science intended to prevent crime by fairly, justly and reasonably punishing those guilty of its infraction, there can be no reason for a jury on the theory that they will be more merciful than judges learned in the law and capable of deliberately and judiciously analyzing, weighing and applying all the facts.

Knowing they will be tried, not under the law and facts, but upon the emotions and sympathies of the jury, which the law itself would not permit, murderers and perpetrators of other crimes are encouraged and the spirit of anarchy is inculcated. Imagine those guilty of violence, intimidation, and destruction of property during "strikes," being tried according to the letter and spirit of the law.

Tenth. But the strongest reason against the system lies in the fact that instead of every offence being accurately defined and punished, juries are continually adding to the definitions and destroying the certainty of punishment. The eloquent attorney who proclaims that "there is a higher law" is but inviting the jury to do something

which the judge rarely ever does—violate their oaths of office. What a rich harvest of criticism Mr. Delmas reaped by attempting to read into the law a new excuse for crime with his "Dementia-Americana"! But he was frankly stating the reason for retaining the jury—to avoid punishment for a crime clearly proven under the exact definition of the law. If it were known to be a fact that every crime would be punished according to its definition, there can be no doubt of the salutary effect. It is the uncertainty of a jury verdict that breeds criminal desire and anarchy.

In civil cases.—Juries are taken in civil cases to avoid the law. This may appear dogmatic, but it is believed the assertion can be maintained. "Personal injury" damage suits against railroads and other employers of labor in dangerous occupations afford the most striking illustration. They are told that the injured party "assumed the ordinary risks, incident to the employment," that "the negligent acts of the employer must have been the proximate cause of the injury," that "the defendant is not the insurer of its employees," etc. But scarcely a verdict is reached except upon the general reasoning to the effect: "O, well, this man was hurt in the employ of the company; he can't afford to lose the money and the company can; if we are wrong the upper courts will set us right," etc., and thereupon a substantial verdict is rendered against the defendant. Not a definition of the carefully prepared charge of the court is considered, even if understood, and jury sympathy supplants the law. Appellate courts complacently hold themselves "bound by the facts thus found by the jury, though we might have found differently if left to us alone," and the law goes on changing from system to doubt, and from doubt to hopeless confusion, and from hopeless confusion to conscienceless anarchy.

Solemn contracts in writing have engrafted upon them parol conditions destroying their intent and purpose.

Public conscience is stultified, if not destroyed, and the law is sneered at and reviled. The average jury inversely reflects the same motives, when its passions and prejudices are appealed to, that actuate the bloodthirsty mob, and calm judicial application of the law is lost in the maze of frenzied oratory.

The jury system is destroying the law, and slowly but surely bringing on the bloodiest revolution known to history. Through it life, liberty and property are becoming more and more insecure as the days pass.

PETTY JURY

BY W. F. WILLOUGHBY

(From *Principles of Judicial Administration*, pp. 497–511)

A calm weighing of the advantages of the jury system in civil cases, supported by the experience of other countries, must lead to the conclusion that the use of a jury in this class of cases, if not entirely done away with, should at least be narrowly restricted to the relatively few classes of cases where it can be advantageously employed.

In point of fact, little attempt is made at the present time to justify the use of the jury system in civil cases upon its intrinsic merits as a piece of judicial machinery. Its defenders do little more than hark back to the services that it has rendered in the past as a protector of the liberties of the people against arbitrary rulers and as a humanizer of a barbarously severe penal code, ignoring the fact that, with the rise of popular government, the establishment of constitutional guarantees, the securing of an independent judiciary, and the humanization of the penal law, the need for a special institution to render these services, has completely passed away. Typical of the arguments brought forward in support of the jury system is that of Joseph H. Choate, in his address before the American Bar Association in 1898, which was devoted almost wholly to the defense of that system. In this address he said:

"The truth is, however, that the jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of life, liberty, and property for so many centuries; it is so justly appreciated as the best and perhaps the only known means of admitting the people to a share, and maintaining their wholesome interest in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and training in the law to the profession itself; and is so embedded in our constitutions, which, as I have said, declare that it shall remain forever inviolate, requiring a convention or an amendment to alter it—that there can be no substantial ground for fear that any of us will live to see the people consent to give it up."

The foregoing argument is one that should be carefully examined by anyone who believes that the time has come to abandon the petty jury, or at least so to modify it as to make it into a radically different institution.

In the first place, it should be noted that this statement evidently emanates from one who carries his appreciation of our political institutions, not only as a whole, but as regards specific details, to the

point of veneration. It represents the position of one who apparently believes that American political institutions, taken as a whole and in respect to details, are superior to those of any other country and that the action of our political predecessors, though taken it may be hundreds of years ago, when conditions and problems to be met were radically different, cannot be improved upon. If the same line of argument were advanced in respect to all proposals to change our political institutions and practices, it would mean that it is possible to devise political institutions and practices that are good for all time, regardless of change in conditions and ideals; that there is no such thing as political progress; and that our constitutions and fundamental laws are straight jackets that should yield to no efforts for improvement.

It would hardly seem to be necessary to point out the error of this position. Politics is a science dealing with dynamic, not static conditions. An institution or custom may well have been admirably devised to meet conditions existing at the time of its establishment and yet wholly fail to correspond to changed conditions. Though admitting that age or long established use is a strong *a priori* argument, and that the burden of proof rests upon the one who is advocating change, it by no means follows that the making of change is not often advisable. At all times and in respect to all political institutions, the maintenance of things as they are should be justified by their actual results under existing conditions. If this position is taken, it can be shown how little is the validity of the several arguments incorporated in the statement just quoted.

The first is that the jury system is "so fixed as an essential part of our political institutions" that no change should be made in it. This argument is merely of *a priori* validity. It can be rebutted by showing, as can be shown, that the institution in its present form, no matter what its original merits, no longer gives satisfactory results in practice; and that other countries secure the same ends without its use and through institutions and practices presenting none of the evils admitted to characterize the use of the jury in the United States. Probably the strongest evidence against the retention of the jury simply because it is an old institution is to be found in the fact than in its home, England, its use has been greatly curtailed and, when employed, is operated under rules quite different from those now obtaining in the United States. The evidence is overwhelming that this change in England in respect to the use of the jury has represented an improvement in the administration of justice in that country. The bench, the bar, and the general public are united in sustaining this position.

The second claim by the author of the quotation was that "it has proved itself to be such an invaluable security for the enjoyment of life, liberty and property for so many centuries" that its

abolition should not for a moment be entertained. No one can question this statement as it relates to past times. Since then, the whole problem of securing individual liberties has undergone a revolution. The English-speaking peoples now live under a government of their own and supreme power is in their own hands. The government from a position of supremacy has been reduced to that of an agent, and means have been provided whereby this agent may be rigidly controlled. Especially is this so in the United States where the most severe limitations have been placed by constitutional provisions upon the power of the government, whether acting through the executive or through the legislative branch to do violence to the life, liberty and property of the individual. The need for the jury as an institution from this standpoint has passed away. Other and more effective means have been devised which renders its continuance on this ground no longer necessary.

The third statement is that the jury should be retained, since it is "so justly appreciated as the best and perhaps the only known means of admitting the people to a share and maintaining their wholesome interest in the administration of justice." This argument is almost wholly a sentimental one. It represents the principle of democracy as opposed to that of representative government. If it has validity here, it calls for the support of all proposals for the direct participation of citizens in governments; the initiative, the referendum, and the recall. The same argument has been advanced in favor of the election by the people of almost all officers of the government, even the more petty officers, and even in favor of the spoils system, since under that system so many persons have a direct interest in securing the victory of the party to which they belong. The interest of the people in the administration of justice is precisely that of the administration of all other branches of the government; having a proper conduct of affairs. It is no more necessary that this interest should be stimulated by direct participation in the work to be done than it is in the case of other fields of governmental operations. In point of fact, this participation is had only by a small proportion of the population; it is resented rather than sought, and the nature of participation is for the most part not of a character greatly to increase respect for the manner in which justice is administered.

Fourthly, the statement is made that the jury system is "an indispensable factor in educating them (the people) in their personal and civil rights." It may be that the jurors do receive a certain amount of education through service on a jury. The jury system, however, can scarcely be defended from this standpoint. The interest at stake is not that of the jurors but of the parties to the litigation. It hardly seems reasonable to retain an institution that admittedly has evils and often results in miscarriages of justice on

the ground that it is a means of education to the persons operating the institution.

Finally, the claim is made that the jury is a desirable institution, since it affords "such a school and training in the law to the profession itself." Here again, the interests of those participating in the operation of the institution is considered rather than those of the parties for whose benefit it is supposed to exist. It is admitted that the use of the jury greatly complicates the process of administering justice; that it is responsible for many of the technicalities of procedure; that to it is due the highly technical rules of evidence; and that it is a fertile source of appeals. With Blackstone, Mr. Choate apparently saw in these technicalities and refinements of judicial procedure a merit rather than a defect; that it is advantageous to have them, as they make more subtle the practice of the law and thus make the game more of an intellectual feat on the part of counsel. The extent to which Mr. Choate emphasized this factor as a supermerit of the jury system would be ludicrous were the issue not so important. In other parts of his address he said:

"Let me say what I understand by a jury trial; that picturesque, dramatic and very human transaction, that arena on which has been fought the great battle of liberty against tyranny, of right against wrong, of suitor against suitor, that school which has always been open for the instruction and entertainment of the common people of England and America, that nursery, that common school of lawyers and judges, which has had five times more pupils than all the law schools and Inns of Courts combined—for there are ninety thousand lawyers in America of whom four-fifths probably never saw the inside of a law school.

"It alone atones for and mitigates all the drudgery and painful labor of the rest of our professional work. Here alone we feel the real joy of the contest, that *gadium certainminis* which is the true inspiration of advocacy. Here alone arise those sudden and unexpected conflicts of reason, of wit, of nerve, with our adversaries, with the judge, with the witnesses; those constant surprises equal to the most startling in comedy or tragedy. Here alone is our one entertainment in the confinement for life to hard labor to which our choice of profession has sentenced us, and here alone do the people enter into our labors and lend their countenance to our struggles and triumphs. Sorry indeed for our profession will be the day when this best and brightest and most delightful function, which calls into play the highest qualities of heart, of intellect, of will and of courage, shall cease to excite and to feed our ambition, our sympathy and our loyalty."

Not a word here of the interests of the parties to litigation. The jury is to be commended because it offers the setting of a great contest between counsel to be played before a gallery. It is as if hospitals were to be commended because of the opportunities they afford to practitioners and not because of the patients who are to be cared for.

Space has been devoted to this statement of Mr. Choate because it represents to so great an extent the character of the arguments generally brought forward against the abolition of the jury or even its modification in any essential respect. Nowhere has the author been able to find any really able argument in favor of the jury system in its present form based squarely upon the practical results in operation. It is, as has been stated, admitted that the burden of proof falls upon those advocating the abolition or modification of this system. This burden, it is submitted, has been met by the marshalling of a great body of facts showing the extent to which the system complicates and renders expensive the administration of justice, entails delay and trouble to all concerned, and too often results in positive miscarriages of justice. This done, it is incumbent upon the defenders of the system to meet these facts with other than a mere appeal to the veneration that attaches to a long established institution and to the educational value that it may have from the standpoint of the participating jurors and counsel.

Retention or abolition of the petty jury in criminal cases.—Though many of the objections that can be urged against the use of the jury system in civil suits apply to its use in criminal cases, the argument against its abolition in the latter class of cases is much stronger. The power to deprive a man of life or liberty is such a serious matter that its exercise cannot be too carefully safeguarded. If the vesting of this power in the hands of a single judge, even with the right of appeal, presents an element of danger, and the requirement that guilt shall be established in the minds of twelve men is believed to be not an excess of caution, then the retention of the jury may be justified. The problem of its abolition is one, not of doing away with it entirely, but of determining whether its use should not be restricted.

At the present time petty cases below the grade of felony are in great part tried without a jury. It is believed that this practice can be greatly extended with safety, with the result that the right to a trial by jury will exist only in certain specified cases where the punishment is that of death or imprisonment for a specified term of years. Certainly provision should be made whereby the accused, if he desires, may waive the right to a jury trial and elects to be tried by the judge alone. It is a common thing in municipal and police magistrate courts to try cases without a jury unless a jury trial is demanded by the accused. In criminal cases, the use of a jury is required by practically all of the states in felony cases. Maryland

and Connecticut are probably the only states where the accused is permitted to waive the use of a jury in this class of cases. In both of these states this right of waiver is largel yavailed of, and the results have apparently been wholly satisfactory. In 1924 ninety per cent of all cases tried in the criminal courts of Baltimore were tried before a judge. In Connecticut the system was established in 1921. Four years later a questionnaire was sent to judges, prosecutors, public defenders, and a considerable number of attorneys to elicit their opinions regarding its workings. The response was an almost unanimous endorsement of the system.

The Missouri Crime Survey, the Michigan Commission of Enquiry into Criminal Procedure, the California Commission for Reform of Criminal Procedure, the Massachusetts Judicial Council, and the Committee of the National Crime Commission all recommended that the waiver of the use of a jury be permitted either in all but capital cases, or in all cases.

Unanimity requirement.—If it is diffiult to defend the requirement that a jury shall be composed of so large a number of members as twelve, it is still more difficult to justify the requirement that these members shall reach a unanimity of opinion in order to render a verdict. This point is thus stated by Professor James W. Garner:

"The weakest point in our jury system is the rule requiring unanimous verdicts to convict. Although time-honored, there have always been some to see the absurdity of the rule. Hallam in his "Middle Ages" called it a "preposterous relic of barbarism"; Jeremy Bentham and Francis Lieber inveighed against it and Judge Cooley in his edition of Blackstone declared that the rule was "repugnant to all experience of human conduct, passions and understandings" and asserted that "it could hardly in any age have been introduced into practice by a deliberate act of the legislature." Justices Miller and Brown of the United States Supreme Court and ex-Judge William H. Taft are all on record as favoring a modification of the rule. Justice Ingraham of the New York Supreme Court has suggested the possibility of adopting a rule making a verdict by three-fourths of the jury sufficient to convict, subject to the approval of the presiding judge.

"Nowhere on the continent of Europe does the unanimity requirement prevail. In Germany, Austria, and Portugal a verdict may be returned by two-thirds of the jury; in France and Italy by a bare majority, and in the Nederlands, where crime is almost non-existant, trial by jury does not prevail at all. In Scotland curiously enough a unanimous verdict is required to convict in civil cases while a two-thirds verdict suffices in criminal cases. In England, the unanimity rule still prevails but juries are never empowered, except in libel cases, to pass on questions of law, and in determing questions of

fact they are so much under the control of the court that many of the abuses which result from jury trials in the United States are avoided.

"The theory upon which the unanimity rule rests is that twelve men may be found who will take the same view of a disputed fact, that the balance of each juror's mind can be struck in the same direction, that all are able to feel the same cogency of proof and that no one can be drawn to a conclusion different from that to which his fellows have arrived. It is needless to say that such conditions are rarely present in the minds of twelve men picked up at random from the community. The result is that in many cases a unanimity is apparent and not real. Everyone is familiar with cases in which a single juror has set at naught the opinions of eleven—has by sheer obstinacy and power of physical endurance compelled his associates to return verdicts which did not represent their real convictions or driven them to disagreements, in either case defeating justice.

"The unanimity rule gives too much power to one man. It virtually places the protection of the community in the hands of a single individual who is often selected without regard to mental or moral qualification."

III. *A Substitute for Trial by Jury*

A SUBSTITUTE FOR THE JURY SYSTEM*

BY ED. L. GOSSETT, JR.**

The writer submits that the jury system should be abolished. In its place we would set up a trial court composed of three judges to whom would be submitted the facts as well as the law of each case. A majority of the court could decide any case. A record of the evidence would be carefully kept by a court reporter as at the present time and rights of review and appeal would be in nowise impaired. Such rights would be rendered simpler and more effective because the trial judges would be required in each case to state the reasons for their conclusions and to file their findings of fact.

The reasons for a jury system no longer exist. The jury originated as a protection for the people from the tyranny of monarchs in those days when judges were the agents of absolute sovereigns. In a democracy the people rule and do not need this sort of protection against themselves. In a democracy the jury system has little or no place unless we presuppose inability and corruption on the part of the trial judges; and unless we at the same time presuppose an

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absence of these things in jurors. Our sentimental eulogies to the jury system proclaim it to be the bulwark of our liberties and the safeguard of our lives and property. A careful study of it will reveal that the jury system more often endangers our liberties and is a hazard to our lives and our property.

Our methods of selecting a jury tend to choose men who have heard nothing of the case, know nothing of its history, have never had any experience with similar facts or issues, and whose minds are as nearly blank on the particular subject as possible. The theory here is that the entire proceedings shall be to the jury one of first impression. The resulting evils are too numerous for elaboration. We are familiar with the enormous expense attached to the trial of capital offenses where frequently hundreds of men are summonsed on special venires and a week or longer is consumed in selecting a jury that perhaps cannot agree after its selection. Often a small civil suit will occasion unreasonable expense. It will not only consume the time of the court but jurors will suffer personal and business losses in discharging this duty of citizenship. It is not uncommon for the jurors to suffer a greater personal loss than is realized by either of the parties to the litigation. Again the jury system is too often made a vehicle for the lawyer who hasn't any case. In seven-eights of the cases where the selection of a jury is optional with counsel one finds the party having the weakest case taking the jury. The reason is obvious. In many cases the only strategy left to the hard pressed counsel is to so muddy the waters that he may come out of the trial with some advantage to which he is not entitled. One often finds a defence attorney (however reprehensible the practice may be) resorting to the expedient of confusing the minds of the jury in such a manner that no verdict can be reached for the state or for the plaintiff that is entitled to the relief sought. Particularly in the small town jury we have the additional problem of securing a jury who will not decide the case on the basis of their admiration or dislike for the respective attorneys with whom they are acquainted. Even the most scrupulously honest juror is often subconsciously influenced by these irrelevant factors. All of these things would be less objectionable and would be minimized in the proposed tribunal of three judges. While we seek in the jury the benefit of twelve minds we in fact often get the benefit of only one or two. The jury is too often a jury of one man, he being some strong, dominant personality who controls the rest. In practically every case where juries are to be selected some lawyer may be heard to say to his associate counsel "if we take that man he will be the jury." Then there's the common and shameful spectacle of the "sinker" on the jury. He is the man who may be accidentally or purposely placed there and who is going to decide the case in favor of his friends, regardless of the merits, or else hang the jury. The writer has in mind a famous murder trial

handled by a friend. The murder was a repulsive, inexcusable affair. The defendant was an old resident who knew all prospective jurors. When the jury was empanneled the defendant's attorney knew that he had won his case and that his client would never be convicted. Such a thing could not possibly occur with such frequency were cases tried as proposed before a trial court of three judges. The trial of a complicated civil suit will often require days and days of tedious trial work on the part of court and counsel. On the completion of such a trial it often becomes necessary to submit to the jury from twenty-five to fifty special issues or questions that must be answered before the case can be disposed. The jury has probably forgotten much of the tiresome evidence. The issues are often so intricate and involved that even the lawyers themselves would experience great difficulty in working them out. It would be much better to permit three skilled judges to take such evidence and such issues into some inner chamber and there work them out with methodical and painstaking accuracy. The miscarriage and paralysis of justice would then be reduced to a minimum.

But when one attacks the jury system one at once hears the old battle cry of democracy. A pure democracy of course would be that state of society in which no governmental restraint of any kind was placed on the action of the individual; that such a condition would result in chaos is readily apparent. Merely to cry democracy is not to offer an argument. In terms of efficiency most every phase of our social order has outstripped that of government. We must think of our judiciary in terms of protection, in terms of securing the desired results, and then let it stand or fall by that standard. If a trial court of three judges would be more serviceable to our jurisprudence in its service to an enlightened and progressive social order, then why bury our heads in the sand and cry democracy. We believe in placing experts with trained minds in control of most of our social and economic institutions, then why should we turn over to non-experts with untrained minds one of the most important departments of our judiciary. If we have experts to determine the law why not have experts to determine the facts. The facts are often more difficult of accurate determination than is the law. If we demand an expert judge why not demand an expert juror We do not distrust our judges in the important domain of the law, why should we distrust them in the important domain of the facts, certainly integrity is not related to ability in the inverse ratio.

A trial court of three judges would have many advantages over the present jury system. The judge is a man whose mind is trained to weigh evidence who understands its purposes and admissibility, he is skilled in the detection of falsehood, and he is not so likely as is the juror to be influenced by passion or prejudice. In submitting

the facts to the judges we would avoid confusing the minds of even honest and intelligent voters with a mass of technical issues and complicated facts with which they are unable to cope. Would the judges or the jury more likely arrive at a correct finding of facts? To ask the question is to answer it. The juror cannot be expected to properly weigh evidence; at best he is often mislead by some irrelevant or prejudicial factor in the case that would not trouble the trained trial judge. Again we are less likely to have "sinkers" on the bench than on the jury. Since time immemorial judges have been particularly distinguished for courage and integrity. They have prided themselves in a high sense of honor and have guarded zealously the sacred trust imposed upon them. It would be very improbable that corruption or dishonesty would ever control the decision of more than one member of the proposed tribunal. It would be very improbable that corruption or dishonesty would often control the decision of even one member of the court. If that should happen occasionally no especial harm would result since the court's decision would be controlled by a majority vote. That contingency would be rendered further improbable, however, because the proposed system would hold out to the judge who would betray his trust the certainty of dishonor, disbarment, and imprisonment.

We submit that the miscarriages of justice under the proposed system would be many times less than under the jury system. We submit that the expenses of operation would be greatly reduced, that efficiency would be promoted, that a vastly greater respect for law would be developed, and that an increased wholesomeness throughout our entire social order would result.

THE AMERICAN JUDGE AND THE AMERICAN JURY*

BY JOHN ALTON BURDINE†

The exalted position of the trial jury and the corresponding impotence of the judge are outstanding features of American judicial administration which today are subject to the trenchant criticism of observers, both foreign and American. Under our federal system of government the administration of ordinary civil and criminal law falls within the province of the states, and, consequently, a proper appraisal of our system of administering justice must be confined largely to an analysis of the work of the state courts. Although there are considerable variations as to detail in the structure and functioning of the court systems in forty-eight separate jurisdictions, one is struck by the uniform adherence that is given to certain "fundamental" principles of court organization and procedure. The one

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characteristic that is most striking is the relative position of judge and jury in the trial of civil and criminal cases.

The present features of our state judicial systems find their roots deeply imbedded in the past. The history of the states for seventy-five years following the Revolution shows the influences that set the moulds for our modern judicial administration. Distrust of the colonial judge, an appointee of the English crown, and the individualism and fear of concentrated power generated by the frontier and represented in the great "democratic" movement of the nineteenth century, combined to make the judge even more powerless than his common-law prototype. The democratization of the administration of justice, as Professor Holcombe clearly demonstrates *(State Government in the United States*, Rev. Ed. 1926, p. 426), which was inevitable under frontier conditions of a century ago, tended to exalt the jury at the expense of the judge. The jury became the pivot in the judicial process, for it represented another democratic check upon governmental power. The historical pattern then cut to fit frontier life has been twisted to the utmost to meet the needs of a metropolitan age, and in most respects it has miserably failed to effect its purpose. The chief reason for this failure is the fact that in the trial of cases the judge is legally a mere umpire, the jury sits upon the throne of power, and the lawyer is the main performer in, what one has called, "the free show at the courthouse."

Trial by jury has been used far more in the United States than in any other country in the world. The constitution of every state guarantees the right to trial by jury in criminal cases; and in civil cases this right is guaranteed by the constitutions in all states except two. In civil cases a few states permit waiver of jury trial, and in nineteen states a less than unanimous verdict is expressly provided for or permitted in courts of record. In criminal cases a unanimous verdict of a jury of twelve is required by all states in capital offenses, and in felonies in all states except Louisiana. A few states now permit waiver of jury trial in criminal cases, but usually only in misdemeanors.

Not only is the jury used extensively in the trial of cases, but upon this venerable institution is bestowed considerable power. Although the theory behind the operation of the jury is that it shall be the judge of the facts only, in some jurisdictions it is judge of both the law and the facts. To the jury is submitted the whole case for a general verdict one way or another. Furthermore, in a majority of the states, the judge is not permitted to analyze or to comment upon the testimony presented, or the credibility of the witnesses. Consequently, in the words of one authority, "the judge has largely been reduced to a mere presiding officer in most of the states. The judge as the permanent technically-trained agency in the administration of justice is subordinated to the temporary non-technical agency, the

jury. . . . In most states the lawyers, and not the judge, primarily determine who shall sit on the jury. Judge and jury are the audience. The lawyer's primary interest is in victory for his client. The trial is too often a game of skill or of chance." (W. F. Dodd, *State Government*, 2d Ed., 1928, p. 297.) In marked contrast to this situation is that in England where "the central figure of a jury trial is and always has been not the jury, but the judge. It is felt that the judges represent His Majesty, the King himself. They are his officers; they are there for life. They come into the King's own court of justice carefully garbed for their royal role. It is not the judge but His Majesty who speaks. Consequently, every syllable uttered by the judge has weight and dignity. He not only rules the court and lays down the law, but he discusses the facts in detail. He tells the jury how he would decide the facts and how they ought to decide them. He often makes clear his views on the case, and his advice, with its royal warrant, has a powerful effect on the minds of the loyal men who compose the jury. To be sure, the jury has the power to disregard him, and sometimes it actually does. But not often. As a rule the English jury does as it is told." (Robert H. Elder, "Trial by Jury: Is It Passing?" *Harper's Monthly Magazine*, April, 1928, reprinted in *The American Law School Review*, May, 1928, p. 298.)

Since our modern system of judicial organization and procedure is largely based upon frontier ideas of a century ago, it is but natural that in the complex society of today the process of administering justice is defective and needs to be overhauled. It is probable that a majority of the observers of our judicial process would demand only that in readjusting the relationship between judge and jury the judge should be given the greater power without effecting a total abolition of the jury. Some may go so far as to suggest the abolition of the jury in civil cases, but few would contend that in criminal cases it should be done away with entirely. However, due to the demands of our present society, much can be said for the total abolition of the jury, which has, in the minds of a few, become a worthless and obstructionist institution, and substituting therefor a single judge, or preferably a bench of judges. More weight can be added to this contention if a process of selection, other than popular election, were adopted which would reasonably insure that a judge would be competent and well-trained in the law.

This argument presupposes that the jury now serves no useful purpose. To make such a statement relative to such a time-honored institution is to invite caustic criticism from a great majority of people; yet from an analysis of the work of the jury it is not impossible to demonstrate that this step in the judicial process is more futile than useful, more expensive than its service warrants. Furthermore, experience has proved in many forms of adjudication, such as equity, workmen's compensation acts, small claims courts, and the

like, that a judge, or a number of judges, will often render justice more effectively and more conformably to that ideal justice which, in the language of the Massachusetts Constitution of 1780, allows one "to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

In the trial of both civil and criminal cases, the jury is now under serious indictment. The method of selection at present employed insures that "when the jury is finally drawn, it will probably be composed of men and women who are scarcely intelligent enough or educated enough to understand or comprehend the nature and significance of the whole procedure; and in a large number of cases the evidence and arguments concern matters of such technical nature that it is impossible for the type of men and women on the average jury to pass an intelligent judgment upon the dispute." (Bates and Field, *State Government*, 1928, p. 416.) In the language of Professor Callender, a member of the Philadelphia Bar, "no matter how carefully jurors may be selected, they are likely to be persons with the usual imperfections of mankind. They will sometimes be actuated by emotion; they will sometimes fail to perceive falsehood; they will often be unable to weigh probabilities with nicety; they will not always be able to understand the refinements of the law." *(American Courts*, 1927, p. 217.) Hence, the process itself of selecting jurors throws the balance against the utility of the use of the jury as a judicial institution. "Hand-picked" juries, resulting from the system of challenges, are but indicia of the great part that lawyers play in the game of judicial administration, and result often in the miscarriage of justice.

In criminal cases, sympathy too often furnishes the key to the verdict of the jury. Illustrations can be multiplied, and numberless authorities cited, to show that defendants are acquitted because of the personal likes and dislikes of the jurors for the witnesses, counsel, and laws concerned in the cases tried. Public opinion filters through the barred doors of the jury room and plays a significant role in jury deliberations. In any notorious criminal trial, one may ask in the manner of Robert H. Elder, former district attorney of King's County, New York, relative to the Snyder-Gray trial, "Can anybody believe that the jury in that case could and did analyze all the evidence placed before them during days of trial; separate the incompetent evidence from the competent, as to each defendant; synthesize the competent and relevant as to each; and then weigh each group of facts separately, uninfluenced by what they heard and must have been deeply impressed with, but were supposed to disregard?" *(Loc. cit.*, 296.) The only answer that can be made to this question is obvious.

In civil cases, likewise, deep-seated prejudices influence the action of the jury. It is a well-known fact that juries usually discriminate

against corporations and rich defendants. But the most condemning feature of jury trial in civil cases is the fact that the jury is utterly incapable of settling the questions of a highly technical nature that our social and economic system presents for solution. Such questions, arising from the complex interrelations of modern life, require the judgment of the expert, not the layman.

In every general verdict there are three elements: (1) the facts, (2) the law, and (3) the application of the law to the facts. Each element, to be effectively ascertained or applied, must be, by the very nature of things, entrusted to those trained in the work. The jury, temporary and subject to influence by all the dramatics of the court-room, is totally incompetent, in practically every case, to deal justly with any one of the three elements. Consequently, a solution for the evils incident to jury trial, such as "false logic, unprofessional trial tactics, appeals to bias, passion, and prejudice, exceptions to the admission of evidence, all the errors in charging the law, most reversible errors, the congestion of calendars, delays of justice, most of the uncertainty of litigation," must be found in the abolition of the jury. (Report of the Committee on Criminal Courts and Procedure of the New York County Lawyers' Association, quoted in Elder, *loc. cit.*, p. 294.) In other words, the judge, or preferably a bench of judges, must take over the supposed functions of the jury. Nor would this practice be despotism.

"The intricate questions now laid before juries for decision," contends Mr. Elder, "must be presented for correct solution to persons who know the rules of decision, who are practiced in the art of using them, who are skilled in the rules of exclusion and inclusion and in the methods by which the values of testimony are ascertained, persons who, by experience, know the 'tricks of the game'; how the police operate and how unreliable they are, what motives lead to perjury, how falsehood manifests itself, both in manner of expression, and in the methods of construction of its testimony. They must be submitted to persons who by observation and practice have learned how to detect falsehood through analysis of the spoken words and comparison of relative values—in other words, by specialists, by judges. It is too much to expect ordinary laymen, men without special training, to do these things, just as it would be too much to expect them to solve chemical problems without having studied chemistry. If it be thought that there is anything mystical or effective in the number twelve, or in a unanimous vote it is not necessary to insist that these problems should be submitted to a single judge. Let more be called in, even twelve, if thought necessary; but by all means let us commit these problems to those qualified by study and experience to deal with them." *(Loc. cit.*, 297–298.) Such is the reasoning of one who knows the intricacies of the judicial process. It is useless to argue whether

judges can be trusted or not. Certainly they occupy revered positions in the community, and almost all are above suspicion of pecuniary corruption. People have placed great faith in a demonstrably incompetent and generally illiterate jury. Would it be more dangerous, then, to place such trust in the judges themselves?

If trial by jury were abolished and trial by judges instituted, Mr. Elder *(loc. cit.*, p. 300) points out, in language that is convincing, the many advantages that could be discerned:

"No jury has to be 'packed.' No jury has to be examined and 'picked.' That impossible attempt to differentiate between the partial and the impartial, the ignorant and the intelligent, is obviated. At the beginning of the trial, the court confers with counsel about the issues. Facts are conceded. Many disputes are thus disposed of by agreement, and the trial very much shortened. A few vital points only are contested.

"The court frequently takes the witness in hand himself. He asks many questions. He sees just where the testimony is lacking. He asks that such points be cleared up. He is not interested in mud-slinging or catch questions, so there are none. It is a thinking trial. If necessary, he takes a recess to give opportunity to clear up doubtful matters. He is not interested in getting through, but in getting facts. If a witness makes mistakes due to nervousness, he understands and does not hold it against him. Nobody has to tell him the law. He knows it, or can find out. He has time to do this; he takes time. He asks counsel to aid him if the law is abstruse. The trial is not a dramatic performance to impress observers. It is a thoughtful earnest conference and investigation into the facts. No lawyer is there to confuse the judge, or to 'pull the wool over his eyes.' All counsel on both sides are trying to help. They realize that that is the only practical thing to do.

If the case is difficult, close, and doubtful as to the facts the judge does not have to decide on the minute or remain in a locked room for hours till he decides. He can take his time. He can order the minutes of the testimony, study them, and make sure what the facts are. He will frequently find that when studied carefully, analyzed, and classified at leisure they are by no means what they seemed to be when the testimony was spoken. He can visit the neighborhood involved and study the physical conditions on the spot. They often reveal themselves much better than spoken words can picture them. There is, in short, no device that can be thought of for ascertaining the facts in their true light and relationships that is closed to him. When he renders his decision he will relate the facts, not in the form of general conclusions, but in their particulars, as he finds them to be credible, and upon these he will base his decision. Thus the justice, accuracy, and intelligence of his work may be known of all."

Trial by jury may never be abolished in the United States, for time enshrouds such institutions with a sanctity that weakens the force of constructive criticism. However, the strong indictment that is now made against jury trial is having, and will have, desirable effects. At least, a curtailment of the powers and functions of the jury, even to the point of abolition, is neither an impractical nor an idle dream.

CRIMINAL LAW—WHAT'S WRONG WITH IT?

BY CHARLES S. POTTS

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(From *The Dallas Morning News Reprints*, No. 1 of a series of fifteen articles on Texas Criminal Procedure, Published in the Dallas *Morning News*, Dec. 26, 1928–January 9, 1929, pp. 16–18.)

Trial by jury.—There is much being said and written at this time in favor of the abolition of jury trial in civil cases and even in criminal cases. Some writers would substitute trial by a judge or a group of judges in place of trial by a jury of ones' peers. It is claimed that jury trial is slow, cumbersome and expensive and that the ordinary juror is quite incapable of understanding the intricacies of modern business and commercial controversies or the crimes that grow out of them, such as were involved in the famous Fall-Sinclair-Doheny-Daugherty cases.

While there is much to be said in favor of an abolition of the jury in civil cases, it will here be assumed that in criminal matters the jury is here to stay, at least for many years to come.

Waiving of jury in felony cases.—The Constitution of Texas declares that "the right of trial by jury shall remain inviolate," but it confers upon the legislature power "to pass such laws as may be needed to regulate the same and to maintain its purity and efficiency."

This provision, it would seem, was adopted to protect the citizen in the enjoyment of a "right," but not to compel him to exercise the right if he does not care to do so. Its beneficent purpose is fully accomplished if the person accused of crime can in all cases and without cost to him have a jury if he wishes one. But so much wedded to the jury system were our ancestors of seventy-five years ago that they wrote into their first penal code, in 1856, a provision to the effect that "a defendant in a criminal prosecution for any offense may waive any right secured to him by law except the right of a trial by jury in a felony case."

However, the world has learned a great deal in the last three-quarters of a century and one of the surprising things it has learned is that persons accused of crime are not nearly so strongly wedded to the jury system as the Fourth of July orators would have us

believe. For, as a matter of fact, it turns out that wherever defendants have been given an option in the matter, about four out of every five of them prefer to be tried by the judge rather than by a jury.

In England, where defendants enjoy the privilege of waiving a jury, about 85 per cent do so and are tried by one or more judges. In 1925, out of 50,764 indictable offenses only 8,120, or 16 per cent, were tried by jury, and of non-indictable offenses the percentage of jury trials was much smaller.

In Canada a large majority of cases are disposed of by the judge without the help of a jury. Similar results have been reached in Connecticut, where a statute of 1921 permits defendants to waive trial by jury.

Much the same story is told by the State of Maryland. As to the results reached in that State, let Mr. Edgar Allan Poe give testimony. Mr. Poe, who was for four years attorney general of the State, in a recent magazine article says:

"For more than one hundred years a person accused of crime in Maryland has had the privilege under the State Constitution of electing to be tried by a judge instead of by a jury. As a result, juries are dispensed with in the great majority of criminal cases. The statistics for Baltimore show that 75 per cent of the criminal cases were tried before a judge without a jury.

"It is no unusual thing for cases involving capital punishment to be so tried. On these occasions it is customary but not obligatory for the presiding judge to ask at least two other judges to sit with him. There is rarely, if ever, a miscarriage of justice. The rights of the accused are scrupulously protected and the cases are disposed of expeditiously and without any of the theatrical display and unseemly wrangling that so frequently disgrace trials before a jury. Indeed, if the question were only whether the guilt or innocence of an accused person is more likely to be detrmined correctly by a judge or by a jury, the proof would be overwhelmingly in favor of the former."

Saving in time and money.—Trial by the judge without jury results in an enormous saving of time and money. According to Hon. Carroll T. Bond, presiding judge of the Court of Appeals of Maryland, trial by the judge takes not more than one-third of the time required for trial by jury and much less than one-third of the expense. Ordinarily, he says, two criminal courts are sufficient to care for the criminal dockets in Baltimore, a city of nearly 800,000, or three times the size of Dallas or Houston.

Judge Bond says:

"At times there is not enough unfinished business for two courts, and one is able to keep up with the work. It is ordinarily possible to give trials without any delay beyond such time as may be needed

for preparation and there are times when the court seems too close on the heels of the grand jury, when the court is prepared to give trial on the day after indictment. For some years, now, only one jury panel has been kept in attendance upon two criminal courts, and, even so, the jurymen spend much of their time sitting aside as spectators. Of the 1,500 criminal cases docketed during the four months of the January (1925) term of the Criminal Court of Baltimore City, all except 177, mostly those last docketed, were disposed of before the final day of the term. Unquestionably this comparatively rapid disposal of business is due to the prevalence of trials without jury."

Testing qualifications of jurors.—It is common knowledge that an enormous amount of time is consumed in selecting juries in criminal cases. One case in California required ninety-one days to complete the jury. In a noted Chicago case, 4,821 jurors were examined at a cost to the people of $13,000. Contrast this with the procedure in the celebrated Crippen murder case where only eight minutes were required to select the jury.

Mr. Justice Riddell of the Supreme Court of Ontario tells of having opened court across the border from Detroit just as a famous murder trial was started in that city. He cleared his docket, consisting of nearly thirty cases about equally divided between the criminal and the civil law, sent nine men to the penitentiary, adjourned court and returned to his home in Toronto. The next morning the papers announced the selection of the tenth juryman in the trial in Detroit. . . .

WHY TRIAL BY JURY?

BY LEON GREEN*

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I

In early England, and in the pioneer days of our own country, the sheriff, as the chief officer of the shire or county, could be depended upon to summon twelve or more good men and true for jury duty without any undue embarrassment of justice. But the political possibilities of his office were too great. He aligned himself offensively and defensively with influential lawyers and all character of other interests, so that it required generations of reform to separate him from the power to dispense favors and protection to as well as take vengeance upon, juror, litigant and lawyer alike.

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In his stead have been set up jury commossioners, jury wheels, and many other schemes for cataloguing, drawing and checking jurymen, some of them extravagant in their detail. But still the results are no better. In New York the statutory provisions on the subject take up 236 sections of the Judiciary Law. Panels of from twenty-four to forty-eight prospective jurors, and in important cases or where there are several courts, many times that number are provided for each week of the jury calendar. And once a panel is presented in a particular case, the process of selection has barely begun. First, the judge will excuse those who have legal exemptions (and these are many) and also those having good execuses, even though not exempt under the statute. Inasmuch as lawyers are sometimes consulted as to what is a good excuse, some of our intelligent peers come well prepared to be excused.

But the chief effort at elimination comes on the part of counsel in seeking to disqualify members of the panel for cause and to discover ground for exercising peremptory challenges. The examination by counsel takes a wide range; the possible grounds for challenge are innumerable. A bias or prejudice against a rich litigant, or a corporation, or a public utility, or in favor of a poor man, or a certain class, or against capital punishment, or against damage suits, or a definite opinion about the merits of the case gained through the newspapers or by personal contact with the witnesses, or by kinship or by employment or (in some jurisdictions) anything that may be "reasonably calculated" to make the juror less than "white as paper" a "perfect perpendicular" or a "judicial blank," will disqualify him. Here, again, the intelligent juror caught on the panel discovers quickly how to disqualify himself. Having eliminated as many as possible of the undesirables for cause, the parties each have from three to thirty-five peremptory challenges, depending upon the jurisdiction and class of case, which they can and usually do use, for good reason or no reason at all, to get rid of those not desired who have not been eliminated otherwise.

Here we have a slaughterhouse of the few remaining peers on the panel. Whatever may be the law's ideal, the parties are not seeking impartial citizens; they are interested in obtaining favorable jurors. The time squandered in this preliminary may run from an hour to a week or more—time enough, in many instances, to try the case. The selection of a jury within three hours by Justice Bailey under the new Federal Court rules for the second Sinclair trial is the most remarkable instance of dispatch known in modern American jury trials. But even this small detail of procedure will require probably fifty years and hundreds of decisions before it will become a part of trial by jury generally in this country.

Assume that the machinery of justice is now set up for the particular case. The next case, of course, must provide its own jury; each party has his own set of peers. But to the merits! The parties are nervous, the judge is impatient, the witnesses are jumpy, the members of the jury are eager to be about their business. Counsel are not so impatient. They know who must do the chief acting in this drama, and the time required in order to act to advantage. In the examination of the jury they have introduced themselves. Whether serious and dignified, smiling and friendly, blustering and bullying, suave and clever, blunt and brutal, or quiet and cautious, they have chosen their roles. They are now ready to make their second appearance in the opening statement to the jury.

The opening statement is for the purpose of preparing the jury for what is to follow by way of proof. It is an outline of the theory of the case from the opener's standpoint, together with a statement of what he expects to prove and how. It offers no mean opportunities to a skilled trial lawyer. There is no argument so telling as artistic statement, and here the plaintiff's counsel has the advantage of talking to the jurymen while they are still eager and fresh. The lawyer who knows his jury neither overdraws nor blurs this first picture, and its lines are ineradicable. The opening statement gives the plaintiff his first great chance to tell his story. He will have few others so dependably favorable. But when the plaintiff is through, the jury is whetted to hear what the defendant can say, and his story must be even more greatly told if he is to overcome the advantage of his opponent.

Let it be noted that the whole scheme of trial by jury is designed to produce effects tellingly. The prelude in selecting the jurymen affords an opportunity to build up their expectancies, and arouse their emotions to a pitch where they can picture themselves chosen to play a most important part in a most serious business, and that under the public gaze. The longer the trial lasts, the larger the scanning crowds, the more dramatic the witnesses, the more intensely counsel draw the lines of conflict, the more solemn the judge, the harder it becomes for these triers of the facts to restrain their reason from somersaulting. Little wonder the juries so often become avengers in behalf of an outragd plaintiff or persecuted defendant! The doers of justice are made as keen as the bull for his fight. This was well illustrated in a recent New Mexico case, in which the plaintiff sought to recover damages for money taken from him by force. The jury returned this verdict: "We, the jury, find for the plaintiff in the sum of ten thousand five hundred dollars, less one hundred and ten dollars, and sentence each of the defendants to five years in the penitentiary, and recommend the mercy of the court."

II

Each witness, feeling the importance of his part, is eager that his testimony be of the greatest value to his side and of the utmost hurt to the opponent. The litigants, knowing that they are down for leading roles, dress for the occasion, and bring their retinues of relatives and neighbors, whom counsel must both encourage and censor. Even the audience enters into the spirit of the play, taking sides and applauding one way or the other. The court attendants do no less. The judge unconsciously exaggerates his conduct. Of all these, counsel alone, if skillful they are, know that the rest are mere stage dressing for themselves, one of whom must be the villian and one the hero, but which, neither is yet certain. The play depends upon their finesse and artistry. In other words, it is the lawyer who makes trial by jury dramatic, and trial by jury was designed and perfected through the centuries, perhaps unconsciously, to make a stage for him, its chief factor. The institution is the lawyer's most artistic handiwork; the courthouse is still his playhouse.

The offering of evidence gives fine advantage to all parties in the play. The lawyer offering the witness assumes the attitude calculated to put him in the best light; the opposing lawyer objects and storms, or what not, as seems best suited to put the witness in the worst light. The judge takes whatever attitude toward the witness and the objections seems best designed from his standpoint to impress the jury and the audience with his impartiality—unless he desires to play a more important part than that of mere moderator. The jury leans forward; the crowd is quiet, and cranes and waits. The witness and the lawyer show whatever skill they possess. They may or may not score; but that is their immediate objective. Whether they do or not, when the tenseness is over the litigants come back into the picture; for the moment they have been forgotten. And thus it goes on until the last witness is excused.

The rules of evidence which have come to govern the hearing of a witness's story appear as if they were designed to enable his opponent to minimize its effect. They are intended to protect the jurymen against hearing anything that may weigh so heavily with them that they will forget matters of greater significance. The twelve triers are so sensitive, it appears, that they cannot be trusted to discriminate between what is worth weighing and what is not. There are many of these rules and they have many exceptions. At one time a violation of any one of them meant certain reversal. Lawyers came to pay a great deal of attention to them and improved them, for they meant "time out" when a witness was scoring or threatening to score too heavily, and perhaps complete relief in the event that the verdict was unfavorable.

This development has been so great that these rules can now be properly presented and discussed only in four, five or six ponderous volumes. Their importance has begun to wane, but there is still entirely too much of this kind of law. Only so much may be ventured here; there would be no law of evidence in the present sense of the term if it were not for the jury. No other method of investigation could use such rules and survive. As trial by jury offers the lawyer his stage, the rules of evidence are but a part of the technique through which he speaks his lines, a technique so perfected as to give the leading role the emphasis and freedom which the drama requires.

After the witnesses have all been heard, the judge is called upon to instruct the jury in the rules of law which govern the case. This translation of a case to the jury is the most difficult and most fatal step in procedure. More cases are reversed for errors in instructions to juries than for any other cause, and this despite numerous devices to make errors here unavailable for reversal. Today the process is largely ritualistic; nevertheless the judge spends hours preparing his charge, and maybe other hours delivering it. The aim of the charge is to control the jury's judgment on the questions which they are supposed to decide without seeming to invade their province. Much of the law's theology has crystallized at this point, and the judge who does not respect the fine shadings of that theology finds himself reversed. It is the least understood of all the procedural devices, both by laymen and lawyers and at the same time it is the least useful.

In a recent rape case the judge mistakenly gave the defendant the benefit of the defences of self-defence, adequate provocation, assault with a deadly weapon, and sudden passion! Nevertheless the defendant was convicted. (Johnson v. State, 267 S.W. 713.) Only in those states in which the judge still has the common law power to comment upon the weight of evidence and advise with the jury is there any real place for this function. Yet the United States Senate has only recently passed the Caraway bill designed to deprive Federal judges of the power to advise and instruct juries. Thus, in the face of the most urgent appeals from all quarters for a better administration of the law, our highest legislative body would take away the power which has given trial by jury its chief, if not its only, dependability!

Closely associated with the charge of the court is the argument of counsel—one to six hours to the side, depending upon the importance of the case. Cases are won and lost at this stage. Counsel may overcome handicaps of prior errors, handicaps of poor witnesses, handicaps of every sort if he has skill in jury argument. Likewise counsel may lose the advantage of good generalship, the advantage of good witnesses, the advantages of a just cause, if he lack skill at

this point. No one knows what the factors are that enter into a jury's conclusions. No one can guess what a particular jury will do. The least that can be said is that trial by jury is a process of strategy, of matching wits, a battle of surprises and emotional struggles at best, and that in this sort of combat the point of merit is apt to be lost.

The closing scene of the trial is played behind the curtain. The jury's consideration of the case is not a matter for disclosure, except by someone listening at the keyhole or peeping over the transom or hidden in the closet. The juror may not impeach his own verdict. We may not hear him confess his own villainy. And well we may not, for in those few jurisdictions in which inquiry into the jury's deliberations is now allowed, it is found that there is seldom a case in which its members do not consider matters prohibited by their oaths—matters that give ground for a new trial. Such, for instance, as the defendant's being insured, or the wealth or poverty of the litigants, or the size of the attorney's fees, or facts that some juror knows about the case or about one of the parties or some witness. Beside, there are verdicts arrived at by the toss of a coin, the turn of a card, or other chance, or by some chicanery used by some of the jurors to get agreement by the others. (Consider, here, the first Knapp trial.) These twelve men once in the jury-room, are real peers. And their verdict is the judgment of the country. It may settle the case. But more and more frequently it is merely the first round of a prolonged bout.

But a moment is required to contrast this ponderous process with trial before a judge, or a board of arbitration. If the jury is taken out of the courthouse, the drama is gone. The courtroom is not the same place. There is no tenseness. The lawyers are not the same; they no longer glare at one another. Even the parties are docile. The judge returns to himself. The attendants drop back into their humdrum ways. The crowd is made up of a few parties at interest and the habitual loungers. The place is dead. There is no haranguing in choosing the arbiter; nothing more than a brief statement of the issues, and seldom that; the examination of the witnesses proceeds with calmness, barring the most exceptional case; objections to evidence are seldom made, and when made, if there is the slightest uncertainty, the judge hears the evidence and states that if it appears to be inadmissible he will ignore it in his findings.

The argument on the issues is brief and pointed. There are no instructions to prepare, no verdict, no motion for a new trial except in the rarest instance. The judge either announces his conclusion, or else takes it under advisement for further study and later announcement. He may then file the findings which support his decision. The whole process is deflated until there is little left to do save get

down to business. The trial of the same case before a judge and before the same judge with a jury, with the same lawyers, reflects the most startling differences; but the differences are those of time and technique and errors. Judge and jury are generally in accord if the jury is not brought under some improper influence. If they disagree, it frequently results from some error or mistake which necessitates a new trial. The differences come in those close cases in which there can be no certain opinion, and in which two juries or two judges would as likely as not reach opposite conclusions.

Time is the most dependable of defences. It can be used both by meritorious and unmeritorious litigants. If a meritorious litigant does not ask for jury trial, his opponent usually does, and probably thereby secures his most effective defensive weapon. He can afford to wait and prefers to do so. His success depends upon adventitious factors. Anything may happen. Witnesses may scatter, death may intervene, the memories of claimants and witnesses may grow dim, opponents may lose interest, counsel may become absorbed in more promising litigation, the feeling of injury and injustice may subside. There are a thousand possibilities.

Time has enabled many unmerited claims to become the basis for dangerous suits, and has in turn destroyed as many more of merit. To the same degree that it helps the one, it harms the other. The fraudulent claimant understands this and it is his insurance of the compromises on which he fattens. Defendants who buy their peace are his victims. It is good business, therefore, to keep the jury docket crowded; the more boldly he can make his claims, the more vicious his enterprises for employing the agencies of justice against herself. The recent disclosure of a New York City investigation of more than 600 pending negligence cases brought by one firm indicates the proportion this business may reach.

But aside from all the handicaps that flow from mere delay, and from the prostitution of procedural devices, the chances for reversible error due to the treacherous steps of the extended process of jury trial are so great that no counsel for the defence can overlook the favorable hazards. This is contrary to the prevailing impression that the jury is the plaintiff's or poor man's friend. No doubt the individual juror is very favorable to the injured person, but despite that fact all available data show that defendants demand more juries than plaintiffs, and this is true even though a plaintiff normally exercises the first choice, thus relieving the defendant from making any choice at all.

The reason is clear. At every turn a defendant may legitimately lie in ambush if he so desires, and most defendants do. The very favorable attitude of jurors for plaintiffs is justification enough for claiming all the protection the offsetting advantages afford. But

there is in fact little basis to warrant the belief that jurors are more favorable to claimants than are judges. In a recent survey of 8800 Connecticut cases disposed of by the superior courts in 1925 and 1926, it was found that of the cases disposed of by jury trial plaintiffs were given judgment in only 50 per cent, whereas in cases tried without juries plaintiffs received judgment in 75 per cent. Approximately the same ratio held in negligence and contract cases, the two most important classes of jury litigation. In *bona fide* cases, judges seem to have more sympathy for a plaintiff's claim than juries. I have heard defence counsel frequently express the opinion that to a *bona fide* claimant the judge will be more intelligently liberal than a jury, and this, plus the fact that a judge can protect his conclusions better than a jury, accounts for the defendants claiming jury trial.

III

How much business is disposed of by trial by jury? How much business can it be made to care for? How well are its peculiar guarantees executed? Trial by jury is not a matter of right in equity cases except in two or three states. Equity cases are numerous, and usually are both important and complex. They are heard either by the chancellor in the first instance, or by a master under the supervision of the chancellor. The procedure may be fashioned to meet the exigencies of the particular case. There are also many cases between employer and employe, once the typical damage suit, which are now handled by industrial accident boards. Jury trial could not handle them satisfactorily, either to the parties or to society. Then there are thousands of small cases, violations of traffic laws, liquor laws, health laws and other police regulations, also small-debt cases of all sorts, which could not be cared for at all if juries were required to dispose of even a smal part of them. Something substantially automatic is required for them. There are a great many more cases in which there are pleas of guilty, confession of judgments in one form or another, and uncontested cases in which there is no need for a jury. Finally, there are very many cases in which the parties waive a jury. In Connecticut and Maryland a very large percentage of major cases, including many serious felonies, are tried by the judge without a jury.

But aside from all these cases, what is the situation with jury cases alone? How much of normal jury business is disposed of by jury trials? A report of the Special Calendar Committee appointed by the Appellate Division of the Supreme Court of New York, First Department, made June 20, 1927, gives about as good an answer to this question as can be found. The report in part says:

"A brief reference to the business pending in the three courts just before the January (1927) call will make this clear. There were

pending in the Supreme Court of New York County 29,466 cases triable by jury; and a case could not ordinarily be reached for trial for 22 months after it was at issue. There were pending in the Supreme Court for Bronx County 9562 cases triable by jury; and a case could not be reached for trial for 24 months after it was at issue. There were pending in the City Court of New York County, about 18,000 cases triable by jury, the delay in reaching a case for trial being 16 months. At the same time there were pending in the Municipal Courts 59,086 cases triable by jury, and a case could not be reached for trial in crowded districts for a year and a half."

And further:

"It is a significant circumstance that a large proportion of cases placed on the calendar are not disposed of by inquest or jury trial. Taking the year 1924, for example, as showing the recent trend, it appears that in that year out of 15,923 cases disposed of, 12,147, or over 76 per cent, were disposed of without trial, by discontinuance, abatement, reference or otherwise. In the years 1919 to 1923, inclusive, the cases disposed of without a jury trial varied between 70 and 75 per cent, except in 1923, when it rose to 80 per cent of the cases which disappeared from the calendar. The presence of these cases on the general calendar undoubtedly caused uncertainty and delay in reaching those of later issues which were awaiting an opportunity for trial."

Taking the country over, this is not far from a representative picture of the conditions of the dockets. Twenty to thirty per cent of jury cases actually tried! This is our constitutional guarantee of the right to trial by jury in performance.

Even more startling is the fact disclosed by a recent statement of Edwin C. Coe, calendar clerk of the Supreme Court of New York County, that the number of new cases added to the calendar in the Supreme Court for New York County for the ten months period ending March 1, 1928, decreased by 11,092, or 72 per cent, as compared with a like period immediately before legislation went into effect increasing the calndar fee from $3 to $20. Under another recent statute, requiring an affirmative demand for a jury trial and a fee of $12 therefor, jury trial was affirmatively waived in almost one-third of the cases when filed, and doubtless there will be further waivers before the cases are tried.

The recent survey made by the Yale Law School covering approximately 8800 civil cases disposed of by the Superior Courts of Connecticut during 1925 and 1926 disclosed:

(1) That juries were had in only 38 per cent of the cases tried in which juries might have been had;

(2) That approximately only 13 per cent (232) in number of all the cases tried (excluding uncontested divorces, uncontested foreclosures and suits for change of name) were tried by juries.

No doubt these two facts account in very large part for the comparatively uncongested condition of the dockets of these courts.

The figures are remarkable in that they disclose that jury trial is little more than a bad habit, and yet one that serves to clog our courts so that only a fraction of the jury business can actually be done by juries. It is significant that we hear little complaint about delays in non-jury cases, despite the fact that there is small time for them, since the time of the courts is taken up very largely by jury cases. It is a safe conclusion that were it not for trial by jury, our present judges could clear their dockets and dispose of all the new business as it came to them, and that the number of judges could be reduced. Clearly it would be impossible to enlarge the judiciary sufficiently, or furnish enough court-room facilities, jurors, attendants, sheriffs and the like, to give prompt attention to all the jury cases docketed without disrupting the general business of the community. Our court machinery is already extravagantly large, so much so that it uses up much of its energy in the mere operation of the machine.

Moreover, the satisfactory disposal of the cases still tried by juries is not at all certain. More jury verdicts than judge verdicts are appealed and more are reversed. Trial by jury not merely clogs the trial court, but furnishes a large part of the business of the appellate courts. In the recent survey of Connecticut cases there were new trials, disagreements and withdrawals in 15 per cent of the cases tried by juries against none in cases tried before judges; this, although the judges tried more than seven times as many cases (excluding divorce and other formal cases) as did juries. Moreover, approximately 26 per cent of the jury cases were appealed, whereas only 8 per cent of the cases tried without juries were appealed. The story is the same everywhere. The record of business done by juries is not merely not encouraging; it alone is enough to condemn trial by jury as a method of attending to the serious business of litigation. There is no promise that it can do better. It has neither the speed nor the precision required.

What of the cost? Little need be said here. Anything that prevents the machinery of justice from functioning properly is expensive—more so than we can calculate. Assuming honest and most effective administration, the time consumed in jury trials, as shown by the Connecticut survey, is more than twice that required in trials by judges. The difference in time in getting to trial is even greater. The cost of obtaining a jury and keeping it until a verdict is reached, the time of the judge and court attendants, the additional time of the parties, lawyers, and witnesses, the greater facilities offered by trial

before a judge in allowing adjournments and accommodations to parties and witnesses, the reduction in appellate reviews incident to the more informal court trial, all make the cost of jury trial anywhere from three to eight times that of any other mode of trial now employed.

This in calculable terms of money; it stands aside from the cost in terms of satisfactory justice. But whether we figure the cost of trial by jury in terms of time consumed, money expended, the quality or quantity of justice afforded, the waste of effort, the abuse of judicial process, or the loss in respect for the administration of law, we discover a deficit far greater than any imaginable satisfactions can overcome. The extra cost of jury trial in the United States is enough to cover the whole outlay required by the judicial branch of government, State and Federal. But it is said that citizens are educated by the institution, and are thus brought to have confidence in their government! I wonder if there is even a glimmer of truth here? And if so, what notions of government do they get?

IV

What is the case in behalf of jury trial? There is none, save such as lies in the reverence we may have for a venerable institution. There are some few cases, as, for instance, foolish political prosecutions, and witch-burners persecutions, in which the jury may save the law's face. But after all, it is usually the backbone of some fearless judge that does the saving in such cases, if there is any saving at all. We have enshrined jury trial along with other antiquated ideas about the administration of justice in our fundamental law, and worse still, in the hearts of our people. They lie there as dead as Hector, and everybody knows they are dead, but who dares touch them? Why make one's self foolish? Those "true friends of the people" who traffic in trial by jury would want nothing better. "Oh, yes, just as we thought, those corporation lawyers and highbrows, those foes of justice, are finally showing themselves in their true garb! They propose to rob the poor man of his one chance of justice, his security against tyranny, the people's jury! They would destroy this jewel of Magna Charta!" Thus they capitalize the tendency in all people to worship the phrases as well as the practices and memories of their ancestors. What can be done against this cry? Nothing.

Few institutions have struck their roots so deeply into the social order for so long a time and persisted through so eruptive a period as trial by jury. Its inception was one of the harbingers of the democratic era. It marks one of the first definite breaks between divine and secular dispensation—religion versus the ballot. It has endured the full period of democracy's ascendency and has been in the vanguard wheresoever democracy has gone pioneering. But as religion

at last gave over a large part of the world's affairs to the voter, the voter in turn is now called upon to give over a large part of those affairs to the scientist. This call will be answered as stubbornly and as grudgingly as was the former.

After all, religion has only become reconciled to sharing her powers with democracy when democracy has in turn shared her votes with religion. So religion finds no pleasure in seeing the voter hand over an increasing authority to this interloper called science. Religion *en masse* is afraid of the scientist; so is democracy *en masse*. The scientist wants too much; he claims too much; he is too self-sufficient; he has no deference for his elders. And he is just as stubborn and far more unmannerly than either the churchman or the politician. He is still young. Moreover, science means technique, patience, disappointment, awareness, understanding, and all these are painful. They are often, indeed, beyond the range of men, whereas religion is always near and soothing, and voting is easy and intoxicating.

To which shall be allocated the administration of justice? Religion surrendered that function slowly and painfully. Only a few vestiges of her ritual remain today; oaths, the third degree, ministering to the condemned. Democracy's victory is complete. The shadow of the ballot is always apparent; the public prosecutor, the grand jury, the trial jury, and too often the judge himself. But can the mere voter do the job longer, or must he stand by for one who knows more about it—more about the true interests of society, more about the determination of facts, more about the prevention of crime, more about handling the complex business of men?

It is hard to visualize the structure of English society during the Twelfth, Thirteenth, and Fourteenth centuries—the formative period of the jury. The important interests of those days were primarily those relating to the possession of the surface of land, those protecting the persons against such violent harms as murders, robberies, assaults and batteries, those pertaining to chattels such as cattle, and those relating to the domestic relations, which were largely cared for by the church. It was to settle simple disputes that the jury had its early service. As the interests—the wants and desires—of people have multiplied a thousand fold and more since that day, so the legal protection granted to such interests has multiplied both in quality and detail. The remedies of those early centuries were few and simple, but drastic and fatal. Their science was crude. The ordeal, compurgation, and trial by battle were just fading out. Death and outlawry were prescribed for crimes; imprisonment and the ruthless seizure of property for crimes and civil wrongs as well. The jury could well understand these blunt methods. The jury also furnished a safeguard against a too tyrannical use of these bludgeons of the law.

The same factors which have repeatedly changed the fabric of the social order have likewise altered the texture of legal thought. Change in one brings change in the other. We are constantly enlarging and remodelling the classification of rights, duties, powers, privileges and immunities in keeping with the general social and economic development. We deal fewer death blows; we take more pains. Even in crime the quickening of a rationalism is felt. In the courthouses alone the medieval complexion of our law has changed least. Here it was most ritualistic, and as formalism is always dearest to men, here it is the last to change. But even here there have been tremendous thanges. Few wigs remain; the old Spencerian flourishes have gone. The most persistent of all the institutions surviving is the jury.

The litigation of the earlier centuries, as I have said, involved simple issues, simply fought out under relatively simple theories of law, and the fight was in the open and the methods of counsel were obvious. All this has changed. Elaborately trained counsel now have at their command the zeal of the publicist, and the machinery of the press, supported by the skill and daring of the sleuth, and the laboratories of the chemist, physicist, engineer, psychologist, psychiatrist, biologist and all the other scientists. It is no longer only the hypothetical question that gives the courtroom its odor of science. It is no longer merely the ingenuity of one smart lawyer at work; a staff of specialists is at his command.

Clients are demanding and receiving all the aid the scientific world can give their cases. Time and money pile up enormously. The data not infrequently assume aspects as far above the understanding of the every-day citizen as modern science is beyond the science of the Fourteenth Century. Under these conditions, honesty and ability to read and write are no longer enough to meet the demands of a modern law-suit. The average jury in any case of difficulty is about as helpful as it would be in solving a problem in the higher mathematics, in industrial finance, or in electrical engineering.

As a formula for administering justice trial by jury is merely a societal antique. But it typifies something back in the growth of society which has been gripped by man's emotions and they will not let it go. Its processes radiate a flavor of popular justice and a flourish of democracy. Those are still stout words. But the fact is that in the organism of society, as in the organisms of all life, there are structural parts which no longer serve useful functions. They reappear nevertheless in succeeding generations. They are sometimes removed from the physical organism by heroic surgery. To this the social organism seldom submits. Moreover, the intelligence that would do so in this instance would not stop with the jury's removal; it would demand more cutting.

But the social body as well as the physical one can isolate a useless part. In a thousand ways already and in others to come the social body is building the jury out of its anatomy. The jury's impotency is widely acknowledged. Informal bodies, courts with special jurisdictions, trial by judges, insurance, arbitration and other devices have already taken over some of its most important functions. Yet much remains to be done before the irritation can subside. The cost and the waste are without calculation. But life seldom counts costs; and neither does the law.

NEGATIVE MATERIAL

I. Efficiency of Trial by Jury

IS TRIAL BY JURY AN INEFFECTIVE SURVIVAL?*

BY A. C. UMBREIT

Professor of Law, Marquette University School of Law

(From *Marquette Law Review*, Vol. 8, No. 3, April 1924, pp. 126–133. Published by the Students of the Marquette School of Law, Milwaukee, Wis.)

Count One: It is charged that trial by jury is old, antiquated, and was the outgrowth of a peculiar social and economic system for the protection of the common people, but that in modern times such protection is no longer needed and the institution itself is unsuited to present-day conditions. It is asserted that trial by jury was first promised and guaranteed by the provisions of Magna Charta and that the conditions existing in 1215 when the signature to this instrument was forced from King John by the Barons of the Realm, were so peculiar that the liberty of the common people depended upon having their rights as between man and man determined by their peers, but that the conditions now have so vitally changed from the conditions then, that there is at present no excuse for the survival of this method of determining facts in litigation.

It is true that trial by jury is old, in fact, the principle is much older than the date given by the writer of the article in question. Again, Magna Charta not only did not create the institution of trial by jury, but did not even guarantee it. Thus it has been said:

"One persisten error, universally adopted for many centuries, and even now hard to dispel, is that the Great Charter granted or guaranteed trial by jury. This belief, however, which has endured so long and played so prominent a part in political theory is now held by all competent authorities to be entirely unfounded."[1]

This historian in concluding his discussion of trial by jury as referred to in Magna Charta says:

"Magna Charta does not promise 'trial by jury' to anyone."

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*This article is an answer to Bruce G. Sebille's article, "Trial by Jury: An Ineffective Survival," *American Law Review*, Vol. LIX, Jan.-Feb., 1925, pp. 67–73.

NOTE: The Sebille article may be borrowed from the Extension Loan Library, University of Texas.

[1]McKechnie, *Magna Charta*, p. 158.

Other historians who have examined the origin of trial by jury have reached the same conclusion.[2] Trial by jury is older than Magna Charta.

The historian Hume credits Alfred the Great (871–901) as the originator of trial by jury in England. Thus in discussing the procedure adopted by Alfred in determining controversies between members of different decennaries, the historian says:

"Their method of decision deserves to be noted as being the origin of juries; an institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that ever was devised by the wit of man. Twelve freeholders were chosen, who, having sworn, together with the hundreder, or presiding magistrate of that division, to administer impartial justice, proceeded to the examination of that cause which was submitted to their jurisdiction."

Trial by jury is older than the reign of Alfred the Great. The institution was known in the time of the Roman Republic; thus under the Plantian law proposed and adopted 89 B.C. the jury was made a popular institution and all classes were admitted to the jury box, three qualifications being required; first, proper age; second, honorable character; third, no other office in the public service. Hence, all Roman citizens were eligible to jury service.

But trial by jury was known even under the Mosaic law. Thus it was provided under that ancient law that in cases where a person had inadvertently or accidentally killed another and had successfully escaped into one of the Cities of Refuge, the question whether the homicide was accidental or otherwise, was not to be determined by judges or priests, but by the "Congregation," that is, by a jury.

The purpose of these historical references is not so much to correct the author of the article in question[3] or to give a chronology of the origin and development of trial by jury, as it is to emphasize the fact that an institution which has survived varying experiences for centuries, under varying conditions, and among totally dissimilar peoples and civilizations, must have something innately vital and must have filled a human want during all these centuries and under all conditions of civilization. When it is remembered that trial by jury in every instance where it was inaugurated in the various civilized countries, ancient and modern, succeeded trials by judges alone, a reason for this vitality is readily suggested. Hence, the age of the judicial system under discussion, its survival under all kinds and forms of civilization, its meeting the needs of peoples and nations

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[2]II Reeves, *History of English Law*, p. 42; Forsyth's *History, Trial by Jury*, p. 91; Pollock & Maitland, *History of English Law*, p. 152.

[3]*American Bar Association Journal*, Vol. X, No. 1, p. 53.

widely different in their tastes, their aspirations, and their governmental systems, instead of being a cause for condign condemnation, is rather a badge of its excellency and fitness for even modern conditions.

Count Two: It is next charged that trial by jury has ceased properly to function as a judicial institution because of the mimicry indulged in "with pathetic earnestness" of selecting members of modern juries from political subdivisions, the inhabitants of which know nothing of the facts involved in the litigation for the determining of which they are selected, and resulting in a situation described as—

"Abysmal ignorance constitutes a condition precedent in the qualification of jurors, and that ignorance must be established to the satisfaction of contending counsel, else the prospective juror is summarily dismissed from the body to which he would, if permitted, have brought enlightenment."

It is possible that there are some benighted communities where the result just depicted by this charge is occasionally produced. If so, such is not the case in this state where jurors are selected by a judicially appointed commission from the electors at large, who represent the average intelligence and integrity of the community. In Wisconsin, women now have full civil rights and are eligible for jury duty, and hardly a jury is now selected here in which there are not a number of women. Hence, here, at least, "abysmal ignorance" is not only not the rule, but not even the exception. If communities can be found where jurors are justly subject to the criticism contained in this count, then such communities receive just the kind of justice they deserve.

Furthermore, this charge challenges the efficiency of the method of selecting the jurors and in no way affects the value of the institution of trial by jury itself. The supposed ignorance of jurors selected to determine facts in a given litigation which, it is claimed, will control their judgment in such determination, would likewise control their judgment in selecting and voting for the three judges of a given division who are to constitute the original trial courts and determine all facts in all litigations arising in the pertinent political division. If the assumed ignorance of jurors in a given case vitiates the due administration of justice in such case, then the same vice would operate when the same ignorant jurors select the trier of facts in all cases.

Count Three: It is next charged that in addition to the ignorance of the members constituting the modern jury, the jurors are asked to determine the issues of an instant case upon a distorted presentation of the facts because of the astuteness of respective counsel in carefully concealing the evidence of material facts that would adversely effect their clients, and that such deceit is possible because of

the artful practices peculiar to the court room. This charge, instead of being a serious one against the modern jury and its members, is a most serious arraignment of the legal profession, as well as a serious reflection upon the courts. If such sharp practices are permitted by the presiding judge in the trial of a case, then such judge is either incompetent, ignorant, or worse, and if a miscarriage of justice results from such practices, it cannot properly be charged against the jury or against the institution of trial by jury. If this practice has become so universal as to call for the abolition of trial by jury, then it must follow that a majority of the members of the bar are skilled in and practice this "astuteness" which results in a distorted presentation of facts elicited from "carefully coached and instructed witnesses." If the majority of practicing attorneys are thus corrupt, then the proposed substitute for trial by jury will call for the selection and election of three judges as triers of all facts from this tainted contingent of the community. Shades of Bacon, note the advance made in judicial procedure under modern civilization!

Count Four: The next charge is that trial by jury is a failure because jurors are human, are subjected to human frailties and delinquencies and possess human passions and desires so that they leave the province of disinterested triers of fact and indulge in prejudice, bias, and all uncharitableness. This accusation is sought to be sustained by the assertion that the three judges who are to take the place of jurors are not subjected to human frailties, delinquencies and passions, but have, by sustained and arduous discipline, overcome these human attributes and become unsympathetic arbiters of facts, cold-blooded logicians and, in a law suit, will "hew close to the line, let the chips fall where they may." Unfortunately, experience does not sustain this proposition. It may seem a paradox, but it is, nevertheless, true that the habitual and constant exercise of balancing disputed facts to discover where the truth lies, unfits a man to determine the truth. Every person, even though he be a judge, has a mode of drawing inferences from certain facts proved, peculiar to himself, has certain theories with respect to the motives that influence conduct, has a strong disposition to adopt and resort to some general rule by which all questions of doubt and difficulty are to be measured and determined. It is certainly extremely unsafe in determining the motives of human conduct which play so large a part in the cases of disputed and contested facts, to generalize and to assume that men will act according to a theory of conduct which a judge, or three judges, may have adopted as a guiding rule. Very many, if not the most, of the cases which reach courts for determination, arise out of commercial and industrial transactions, and it is safe to affirm that the persons most likely to understand the nature

of these transactions and arrive at the truth of the dispute between litigant parties are those who are conversant with the details of business and engaged in similar occupations themselves. It is such men who constitute our juries, who enter the jury box in a given case without any preconceived ideas of how the facts are to be tested and the probative value of circumstances proven to be measured in determining the rights of the parties before the court and the jury. It is a matter of almost common knowledge in the profession that many of our judges, while learned in the law and safe determiners of the law in cases tried before them are rather unsatisfactory triers of fact, and the longer they remain upon the bench the more unsatisfactory their decisions of fact frequently become, because of their withdrawal from the active business and industrial affairs of the community and a consequent want of familiarity with the practical affairs of life.

Count Five: The next charge is that trial by jury is a failure the jury system in that it alleges that the average citizen, and our juries are composed of average citizens, is a man of small means and if at all susceptible of corruption, makes him an easy prey to be influenced in reaching his verdict by financial considerations either directly offered by one of the parties to the litigation, or indirectly offered by the hope or the suggestion of financial advantages in the future after the verdict has been reached. That verdicts of juries have been bought may be admitted, but such crass corruption of our judicial procedure is very rare. If history is to be believed, judges have not been free from being so influenced, but, as already suggested, the instances of verdicts from juries, and decisions and judgments from courts, obtained by bribery are so infrequent, that these few cases cannot be considered as a condemnation of either judges or juries.

Count Six: The last specific charge lodged against the institution of trial by jury is that verdicts of juries are frequently based upon the popular opinion of the community at the time, rather than upon the evidence submitted in court; in other words, that juries are guided by their decisions as to the facts of a case by what they believe would be the opinion of the majority of the people, were the question submitted to them. That juries sometimes decide cases not upon the facts presented to them but upon what they believe would reflect the popular side of the litigation is true, but it can be asserted with confidence that judges are not always entirely free from the influence of popular opinion in deciding cases before them. The instances where the "ear to the ground" is decisive in determining the facts in a litigated case, rather than conscience and judgment, are generally criminal cases brought under an unpopular law, a law that the majority of a community does not endorse. Where such a

miscarriage of abstract justice occurs, the community, as stated before in another connection, receives just such an administration of justice as it deserves.

Perverse verdicts have been rendered by juries, but the damage done to the administration of justice by such verdicts has been greatly minimized, if not entirely neutralized, by the power of the court to set aside such verdicts and grant new trials. A striking example of the use of such power on the part of the court was the recent case of Jackson v. The American League Baseball Club, et al., tried in the Circuit Court of Milwaukee County within the month. The jury in this case returned a large verdict in favor of the plaintiff and the trial court reprimanded the jury for the verdict, set it aside and dismissed the action on the ground that the trial of the case "reeked with perjury." During the trial of the case, one of the witnesses for the plaintiff was ordered arrested by the court for perjury, and after the case had been submitted to the jury the plaintiff himself was arrested for perjury upon the order of the court.

Trial by jury is not to be consigned into oblivion because here and there an individual jury will fail to do its duty, will cause an apparent miscarriage of justice, render a perverse verdict, be misled by the "adroit manipulation and the flagrant disregard of principles" on the part of astute and conscienceless attorneys in the trial of cases.

So far I have considered trial by jury merely as a judicial institution, as an arm of the court in the administration of justice, but trial by jury plays a large part in the social and political life of a community. Serving upon a jury brings the individual not only in close contact with the law as administered by our courts, but brings him in closer contact with his fellow citizens, gives him a very active share in the administration of public affairs and offers him an opportunity to make his voice heard and his influence felt in questions of local interest. Want of respect for the law has been repeatedly urged as one of the dangers threatening our Republic. While quite a respectable number of the people of a community are called to serve as jurors and thus brought into direct and close connection with the law itself and given a share in its administration, respect for the law will be created in the minds of those in whom it did not exist, and will be strengthened in the minds of others who had it, but in whom such respect may have lain dormant.

Trial by jury also tends to foster respect for our courts, the last and final protecting tribunal of our liberties. Abolish this institution and you have taken away practically the last opportunity the great mass of the people have of participating in any way in any of the activities of government, of being in any way concerned in the political life of the community and have left them only the right of exercising

the elective franchise, a privilege which all too many of our citizens at present do not appreciate.

Trial by jury is too deeply rooted in our civilization, is too important to our judicial system, is of too great value to our social and political life to be rudely condemned and unceremoniously abolished at the request and behest of disappointed litigants and their attorneys, and to be replaced by an experiment in judicial procedure which history has shown to be a failure whenever tried and to replace which trial by jury was instituted. At any rate, it is the part of wisdom to follow the conclusion of Hamlet when he said:

"rather bear those ills we have,
Than fly to others that we know not of."

The indictment should be quashed.

HOW ABOUT THE JURY?

BY K. E. LEIGHTON

(From *Journal of the American Judicature Society*, Vol. 8, No. 1, June, 1924, p. 246. Published bi-monthly from 31 West Lake Street, Chicago)

Criticism of our courts has become so common that anyone with a pen or a typewriter feels called upon to add his mite to the subject. For some reason, perhaps for fear of being unpopular, very few have said anything regarding juries.

After twenty-five years of observation and actual experience I firmly believe that the work of juries is the cause of more of the criticism of our courts than the work of the judges or the lawyers, yet I have seen but little attempt made towards improvement.

The theory of trial by jury is, I believe, correct, but we fail in practice for the very simple reason we do not obtain the services of men of experience and judgment to sit as jurors. I was a trial judge for ten years in a state court, mostly in rural communities, and during that time there was only one jury that fulfilled the duties of jurors to the satisfaction of counsel, the judge and the people. No criticism was ever heard of their work and the business of the court was transacted much more quickly and with less friction than during any other term during my experience.

Men who have had no business experience or have always followed one particular occupation are usually not men who are able to exercise that kind of judgment required in jury trials. Such men are not familiar with men and their method of living and cannot correctly judge the motives which actuate men in business affairs or in any circumstance outside of their own particular line of activity. I have no fault to find with the integrity of jurors, but they certainly lack the one great essential to make proper deductions, and that is

judgment, or horse sense, or whatever you may call it. It is apparent in so many cases that jurors are guided by their prejudice or bias. All of us are human, but when we are dealing with the affairs of others facts are a better guide than our emotions. A man who lacks worldly experience is unable to make correct deductions from facts which are so often colored to suit the litigant. It is a common expression of a business man to say that if he has a good case he would prefer to try it to the judge and if a poor one before a jury.

The method of selecting names for the jury box used in many states is to have the city, village, and township boards send the names to the clerk. Too often the question of the qualifications of these men is the least considered.

The method employed in federal courts has resulted in securing excellent juries. That fact indicates that we may also secure improvements in our state courts. We cannot do away with juries, and I would not wish it, but by a selection of names by a jury commission we can improve the personnel of the jury. The Legislature can change the method of selection of names and one method would be to have the judge of each district, or the senior judges where there are more than one, appoint a jury commission that would meet at stated intervals and select names to be placed in the jury box. In this way I am certain that we would find an immediate improvement.

Usually a jury is controlled by two or three men and if on each jury it is possible to secure a small percentage of men of good judgment and experience there will be far less criticism of our courts. In the last analysis the criticism is only important when it affects results and juries are more responsible for the results than the judge or counsel.

THE JURY SYSTEM UNDER CHANGING SOCIAL CONDITIONS

BY JOHN WURTS

(From *The American Law Review*, Vol. XLVII, January-February, 1913, pp. 86–89. Review Publishing Co., St. Louis, Mo., 1913)

There are certain reforms which ought to be made in order to bring the efficiency of the jury system up to present day requirements. All of these reforms can be brought about by an aroused sense of responsibility among the members of the bar. The reforms are bound to follow.

In the first place it should be borne in mind that the increased diffusion of education, bringing a higher average of intelligence which has raised the quality of our juries, has developed the skill of those who, taking advantage of the general respect for the forms of law, stand ready to pervert these forms for their own sinister ends. The

smaller the number from which juries are drawn, the easier it will be to obtain by devious methods juries which are not fairly representative. The social conditions of today have raised questions of portentous import which threaten at every moment to become acute, to arouse blind passion, and to array class against class. It is in such a crisis that unrepresentative juries can be made the instruments of tyrannous oppression. Therefore, legislation should be directed toward enlarging the jury lists to the utmost practical extent and to placing in the box the full list of names except of those who are excusable by reason of service within a limited time.

In my judgment an example of vicious legislation in this regard, full of potential wrong-doing, is found in section 277 of the Act of Congress of March 3, 1911, which would permit United States District Court juries to be drawn from a single county of the district.

But more important still is it that jury drawings should become public functions in fact as well as in law. The only way to bring this about is for the lawyers to make it part of their business to attend and scrutinize the drawings. Why leave the officials designated by law to meet in an empty court room and make up their own record with no one to verify it? We do not allow election returns to be made up in that way. If the drawings were made from full lists and were in fact public we would get rid of the rounders who, in almost every county, appear on the panel term after term to the exclusion of more competent men who should be forced to serve.

I have only spoken of what seems to me a lack of preparedness of the jury system to meet a possible storm, the mutterings of which have come to us in louder and louder tones from Pennsylvania and Illinois and Idaho and Indiana and Massachusetts—a storm which, if it comes will bring widespread danger to life, liberty, and property. It remains for me to speak of an anomaly in our administration of justice whose baleful effect on the trial of issues of fact is becoming more and more obvious. I refer to a large part of the body of our so-called rules of evidence, and particularly to that rule which excludes hearsay testimony—a rule subject to several explicit, and in some cases, utterly arbitrary exceptions.

For the purpose of convicting one accused of homicide we admit the dying declaration of the alleged victim on the theory that the declarant's realization that he is about to die takes the place of the sanction of an oath, and we dispense with cross-examination from the necessity of the case. But with stolid inconsistency, we reject the theory and deny the necessity when the dying confession of another is offered to save the accused. To limit the admissibility of deathbed statements as to relevant or material facts, to what are technically called "dying declarations," lacks, in these modern days, the merit of common sense.

The rule which excludes the self-serving declarations of a party to the suit unless they are a part of the *res gestae*, but admits his declarations against interest, conforms to the ordinary judgment of mankind; but that cannot be said of the rule as to the declarations of a party not in interest, since deceased. Upon an issue of curtesy, we exclude the declaration of the accoucheur as to the birth of the child, if coupled with a charge entry for professional services, but admit it if coupled with a credit entry. Is there any sound reason why the admissibility of such evidence should be made to depend on the fact that the declaration was made against the pecuniary or property interest of the declarant? Men of sagacity do not frame their judgments in the most important affairs of life by any such arbitrary rule.

Forgetting that "rumor is a pipe blown by surmises," we go to the other extreme in proving character and insist that it must be shown by reputation, denying that the opinion of a witness formed from personal acquaintance affords any legitimate basis from which the jury could draw a conclusion as to character.

We have some equally arbitrary and wholly artificial rules of exclusion in the matter of proving pedigree.

This is not a fair way to treat a twentieth century jury. We demand that a jury shall do justice by applying average human judgment to the issues; but at the same time we withhold from them facts essential to reach a judgmatical conclusion, thereby, you may say, blinding them in one eye and depriving them of all sense of perspective.

The present day jury is no longer the body of presumably ignorant men for whom, we are told, these rules of evidence were formulated by the judges centuries ago because their minds were so untrained that they were incapable of making nice discriminations as to the weight of testimony.[1] This is to say that the rules of evidence have not kept pace with the development of the jury idea and with changing social conditions. In early days these rules were mere rules of procedure and they still remain so, technically. But they have acquired all the force of substantive law, calling for legislative action, since we apply them in cases which do not require the intervention of a jury.

The conclusion of the whole matter is that while bar associations and legislative committees are giving heed to the demand for a reform in judicial procedure, they should also turn their attention to measures tending to safeguard jury trials, in view of impending social crises, and admitting that the intelligence of juries has kept pace with general social advancement.

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[1]Hon. Simeon E. Baldwin, 21 *Yale Law Journal*, 105 (Dec., 1911).

THE ARTIFICIALITY OF OUR LAW OF EVIDENCE

BY HON. SIMEON E. BALDWIN, LL.D.

(From *Yale Law Journal*, Vol. XXI, No. 2, December, 1911, pp. 105–106. Published by Yale Law Journal Co., New Haven, Conn.)

The time of an American judge, in the trial of a case, is largely taken up in excluding evidence which, if admitted, would strengthen the case of the party who offers it. He excludes it generally, not because he thinks it would have no effect on the jury, but because he thinks it would have such an effect; not because he thinks it ought not to be admitted in the interest of justice, but because there is a rule in the books against its introduction.

Who made our rules of evidence? Whence do we derive them? What do they rest on?

The answer is easy. Judges made them—for the most part, English judges centuries ago, and made them because they had to deal with juries composed of illiterate men of untrained minds, incapable of making nice discriminations as to the weight of testimony.

The English jury also, when the jury system took shape, was under the control of the judge in all matters, to a degree never known in this country. Down to the era of Vaughan's case, in the seventeenth century, for a verdict in a criminal case that was deemed by the Crown, or the judges acting for it, to be clearly wrong, the jurors could be attainted and punished by fine or imprisonment. Not only were they to be kept together, in order to force a verdict, as now, as long as the judge might think proper, but even down to the eighteenth century they were denied food, light, or heat, and could be carted about after him from one assize town to another. His directions, in all ordinary cases, controlled their decision; the judge was the deciding factor; simply speaking through the mouth of the foreman.

THE TRIAL: PRODUCTION OF EVIDENCE

BY W. F. WILLOUGHBY

(From *Principals of Judicial Administration*, pp. 468–471. The Brookings Institution, Washington. 1929)

In our analysis of the functions of courts, it was pointed out that the determination of facts not only constitutes a distinct function that can be clearly segregated from the other functions of courts, but that in the performance of this function courts have developed a procedure radically different from that employed by administrative bodies. This procedure consists of having the facts brought out by witnesses, who are produced by the parties, and testify as to facts supposed to be within their knowledge. From such testimony it is

the duty of the court or the jury, where use is made of that agency, to reach a decision regarding the facts.

Complexity of existing rules.—In the operation of this procedure the courts have developed a body of rules governing the persons who are competent to appear as witnesses, the nature of the testimony that they are permitted to give, and the character of interrogatories that may be addressed to them. These rules abound in subtle distinctions, many of which are of an arbitrary character. Some idea of the extent of this complexity may be gained from the statement that five volumes, each several hundred pages in length, are required in one of the latest and best treatises on the subjeet fully to make known the character of these rules. Of it, one of our leading writers on the practical phases of American jurisprudence says:

"The science of special pleading is usually pointed to as the climax of legal refinement, but the science of evidence pays a much greater tribute to the microscopic discrimination of the legal mind. It is an elaborate and comprehensive system for excluding evidence from the jury, based upon the fundamental idea that the jury cannot be trusted with all the facts of the case, but only with such as the court thinks are not likely to mislead. Fearful that the jury will draw false conclusions or will become confused in regard to the issues submitted to it, the law devises a protective scheme which is so complex and so infinitely refined that the labors of a lifetime are hardly sufficient to master it. It is a labyrinth set with pitfalls at every turn. No lawyer fully understands it; no judge can accurately administer it. Errors in the admission and exclusion of evidence are not only common but inevitable, and they bring with them appeals, reversals and retrials. No such rules are necessary to protect the judge when he tries the facts, for he is deemed to have sufficient knowledge, judgment, and experience to understand the probative force of whatever is presented to him. But the juror is presumed to be an easy prey to illegal influences and suggestions and if he might have gone wrong by reason of such an error it is usually presumed that he did go wrong.

The following taken from a recent address by a justice of one of our important courts, brings out in a graphic way the illogical character and the evil results of this system:

"I next ask you to consider whether the time has not come for a radical and sweeping change in our whole attitude toward the law of evidence. It was during the last half of the eighteenth century that the jury came to rely upon evidence adduced before it and not in part upon private sources of information. Then there came the first manifestation of our law of evidence, which has rapidly developed from an orderly method of procedure, designed to assist the

jury, into a complicated set of rules too often designed to befog both judge and jury. Most of the time in our courts of law is not consumed with the adducing of evidence; it is largely occupied with controversy and discussion as to the manner in which the evidence shall be adduced.

"And here again I venture the assertion that in this practical country, immeasurably more than in any other civilized country in the world, there are consumed in the courts vast quantities of priceless time with wholly impractical contention regarding forms of questions, the attempt to draw a sharp dividing line between fact and opinion, the unending chatter as to whether the question calls for a conclusion, the meaningless formulation of and assault upon interminable hypothetical questions.

"The law of evidence is not an end in itself and we should cease making it our objective. It is purely adjective law, simply a method by which to ascertain facts. A great accomplishment of the English procedural reform was to emphasize that rules of evidence are merely a method and not an end of litigation. . . .

"In the United States the meaningless mumble of the objection as incompetent, irrelevant, and immaterial sounds through our court rooms like the drone of destroying locusts.

"I have found it well nigh impossible by individual effort to make the slightest impress on this habit. By contrast I recall the trial of an accident case I heard in England. A witness was asked to describe the accident and then was asked: "To what do you attribute the accident?" The answer was succintly given that the chauffeur had not been looking where he was going. I should like to parallel that incident in an American court. The witness would be asked what he saw; he would probably endeavor to say that he saw the chauffeur was not looking where he was going. A motion to strike this out as a conclusion would be promptly made and promptly granted. The question would be repeated. The bewildered witness would again approximate to a statement of what he really thought he saw, namely, that the chauffeur had not been looking; a new motion to strike out made and granted would be followed by an admonition of the trial court to the witness to be careful not to give his conclusion, but only what he saw, and the situation would end with the collapse of a witness, now no longer bewildered, but utterly stupefied by the obscurity of a system of law which would not permit him to tell the story of the accident exactly as he would relate it to any human being in the world.

"I ask, therefore, that the profession realize that most of the objections urged upon trial are futile and meaningless and that we should reform ourselves in this respect by just ceasing to make them. We should also cease requiring our adversaries to formulate hypothetical questions, when the same result can be more simply achieved

by a mere request for the opinion of an expert, and that the unspeakable practice of making our adversary prove a fact, even if you know it is provable, be eradicated among all decent members of the profession."

There can be no doubt that the existence of this mass of complex rules constitutes one of the major defects in our judicial system. No other country has a system comparable to it in its refinements and limitations. More than anything else, it is responsible for making the trial of causes an intricate game in which there is a contest of wits as between counsel for the parties and between counsel and the judge, leading to a multiplicity of appeals and retrials.

It is manifestly beyond the scope of the present work to subject these rules to intensive examination with a view to determining their justification. All that can be done is to consider their general character, the reasons that have led to their establishment, and the lines along which steps for their improvement can best be taken.

In seeking to determine whether the complexity that characterizes the whole system of evidence is necessary and whether there cannot be substituted for it one which is simpler and more direct, it is necessary to examine the underlying principles to determine whether they are ones which should be adopted; in a word, the problem is not so much one of details as of the fundamental principles that should govern in making provision for this branch of judicial administration.

QUOTATIONS FROM AUTHORITIES*

(From "Current Criticism on Trial by Jury," by Theodor Megaarden, *Law Notes*, Vol. 33, No. 7, pp. 123–126, 1929)

Judge Dillion, in a lecture at Yale, said: "I have tried literally thousands of cases with juries, and the instances are few where I had reason to be dissatisfied with their verdicts. I recall with interest the views of the late Mr. Justice Miller and the change of opinion on his part on the subject of trial by jury. His opinions are of value, for by general consent he ranks among the ablest judges who have ever held a seat on the bench in this or in any country. He said to me at one time that his notion of an ideal trial court was a court composed of three judges to try all civil issues of law or fact. Some years afterwards, as a result of more observation and experience, he told me he had changed his views and that he thought juries better judges of fact than judges.

"Twelve good and lawful men are better judges of fact than 12 learned judges."

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*These quotations were selected especially for the Bulletin by Miss Rae Logsdon, '30, The University of Texas.

Mr. Justice Miller: "In my experience in the conference room of the Supreme Court of the United States, which consists of nine judges, I have been surprised to find how readily those judges come to an agreement upon questions of law and how often they disagree in regard to questions of fact which apparently are as clear as the law. I have noticed this so often and so much that I am willing to give the benefit of my observation on this subject to the public, that judges are not pre-eminently fitted over other men of good judgment in business affairs to decide upon mere questions of disputed facts."

Judge Caldwell (after serving on the Federal bench nearly 35 years): "The constitutional mode of ascertaining the sense of reasonable men on disputed questions of fact in common-law actions is by verdict of 12 jurymen and not by the opinions of the judges. It was because the people knew the judges were poor judges of fact that they committed their decisions to a jury, and every day's experience confirms the wisdom of their action."

Lord Penzance (in speaking of a divorce case in England): "I should have preferred having the case tried by a jury, for the question is one of credibility for which a jury is the fittest tribunal."

Lord Tenderden, of England (speaking of criminal cases): "It is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of 12 men, conversant with the affairs and business of life, and who know that where reasonable doubt is entertained, it is their duty to acquit, and not of one or more lawyers, whose habit might be suspected of leading them to the indulgence of too much subtlety and refinement."

Judge Weatherbe (of the Nova Scotia Supreme Court, Canada): "Distinguished English judges who have had most experience with juries have taken pains to express their opinion that they are seldom wrong in finding the facts, especially where they are unanimous. For myself, I have seldom found them wrong except where I had to regret on reflection that I had not taken sufficient pains in directing them."

Chief Justice Armour of Ontario said that the mind of a judge "by education and habit is trained to reject inferences and to require strict proof of every fact, and is thereby rendered less competent to draw reasonable inferences than minds not so trained."

Mr. Megaarden concludes: "While these opinions, however eminent their source, are not conclusive of the matter, they are well worth remembering when we are confronted with the cock-sure assumption of many critics of the jury system that juries are not qualified and

are not competent to perform the duties with which they are charged in the trial of causes and that the judges could discharge those duties much better."

Lord Russell in his book, *The English Government and Constitution,* in expounding upon the influence of juries in interpreting and modifying the laws, says: "Not only are the juries in fact the real judges in England, but they possess a power no judge would venture to exercise, namely, that of refusing to put the law in force.

"This may be a dangerous power as the jury decides in secret, separates and is no longer responsible, yet it has been the cause of amending many bad laws which judges could have administred with exact sincerity and defended with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community in which they are made cannot exist in England."

(From *Moore on Facts,* Vol. I, p. 25, Edward Thompson Company)

Judge Cooley, of Michigan: "The jurors, and they alone, are to judge the facts and weigh the evidence. The law has established this tribunal because it is believed that, from its members, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and to take what may be called a common-sense view of a set of circumstances involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law and as applied to criminal accusations, it is eminently wise and favorable alike to liberty and to justice."

Speaking for the U.S. Circuit Court of Appeals, Judge Shelby said: "The experience of the judiciary as shown by history, should teach tolerance and humility when we recall that the bench once accounted for familiar physical and mental conditions by witchcraft and that too at the lives of innocent men and women. In that day, it was said from the bench that to deny the existance of witchcraft was to deny the Christian religion. Juries would have done better. Then and now, questions of fact were best tried by jury."

Judge Hopkinson of a Federal district court remarked that questions of fact "are referred to a jury, whose natural intelligence and knowledge of men, and the business of men, make them excellent judges of the credibility and effect of evidence."

In a bankruptcy case where the pivotal question depended upon the testimony of two witnesses of apparent equal veracity who directly contradicted each other, Judge Lowell said, "I can only regret that

the parties did not see fit to submit the decision of this question to a jury."

Lord Hatherly speaking for the House of Lords in a divorce case charging adultry, said: "I must confess that I greatly regret that a case of this kind should not rather have been submitted to a jury than brought before the judges sitting as judges both of fact and of law."

Judge Porter, New York: If it be true as is sometimes intimated, even from the bench, that false verdicts are occasionally rendered on questions like this (contract case) the remedy is to set them aside and not to usurp the prerogative of the jury."

Judge Willard, New York Court of Appeals: "From their intercourse with the world, and observation of human conduct, they are more capable than a more secluded tribunal to appreciate the force of the various circumstances which attended the transaction."

Chief Justice Bleckley, of Georgia: "Where there is a possible doubt as to the effect of villainy upon veracity, the jury ought to be left to decide it. As coming from the average of society, they know best what to think on such a question."

Judge Lumpkin, of Georgia: "I would take the liberty of suggesting that the general diffusion of knowledge and education among the people of this country much better fits them for weighing and comparing evidence than in any other nation or age since the institution of trial by jury."

Chief Justice Hazelrigg, Kentucky Court of Appeals: "The jury are taken from the various walks of life, and their combined knowledge and experience afford the very best opportunity for safe and wise conclusions."

Judge Campbell, of Michigan: "The jury system is generally regarded as deriving one of its chief advantages from having the law applied to facts by persons having no permanent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes. It is especially important where guilt depends on a wrong intent, to give full weight to every circumstance that can possibly affect it; and professional persons are under a constant temptation to make the law symmetrical by disregarding small things."

Judge Scott, of the Missouri Supreme Court: "The jury, from their experience and knowledge of the common concerns of life are presumed to be the best triers of fact. They take with them into the jury box their experience in life which has enabled them to form the rules by which they will ascertain the weight to be given to the

evidence of any one who speaks in their sight and hearing, having due consideration of the circumstances by which he is surrounded, his character, if known, and any influences which may operate upon him."

II. Necessity of Trial by Jury

IN DEFENSE OF THE RIGHT OF TRIAL BY JURY

BY JEREMIAH S. BLACK[1]

(From *Ex Parte* Milligan, United States Supreme Court, December, 1866)

We, on the other hand, submit that a person not in the military or naval service cannot be punished at all until he has had a fair, open, public trial before an impartial juray, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offense. There is our proposition. Between the ground we take and the ground they occupy there is and there can be no compromise. It is one way or the other.

Our proposition ought to be received as true without any argument to support it; because, if that, or something precisely equivalent to it, be not a part of our law, this is not, what we have always supposed it to be, a free country. Nevertheless, I take upon myself the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the government, so that it is utterly impossible to detach it without destroying the whole political structure under which we live. By removing it you destroy the life of this nation as completely as you would destroy the life of an individual by cutting the heart out of his body. I proceed to the proof.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the government is the exercise of judicial authority. That is a kind of authority which

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[1]*Speaker* (1810-1883): Member of the counsel for the defense. Formerly Chief Justice of the Supreme Court of Pennsylvania, 1851–1857; Attorney General of the United States, 1857-1860; Secretary of State, 1860-1861.

Occasion: In October, 1864, during the Civil War, Lambdin P. Milligan, W. A. Bowles, and Stephen Horsey were arrested and tried before a military courtmartial. The specific charges were that they were members and supporters of a secret order known as "Order of American Knights," or "Sons of Liberty," having for its purpose the seizure of ammunition, liberation of Confederate prisoners, and destruction of the government in general. All three were convicted and sentenced to be hanged, but Milligan filed petition with the Circuit Court of the United States for a discharge on the ground that his detention was illegal. The Circuit Court, being divided in opinion, therefore certified three legal questions to the Supreme Court of the United States for decision; the central one being, "Had the military commission jurisdiction legally to try and sentence the petitioner?"

would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore, in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive,—they cannot share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress has, from time to time, ordained and established certain inferior courts; and in them, together with the one supreme court, to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. That was the compact made with the general government at the time it was created. The states and the people agreed to bestow upon that government a certain portion of the judicial power, which otherwise would have remained in their own hands, but gave it on a solemn trust, and coupled the grant of it with this express condition that it should never be used in any way but one,—that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way, not only violates the law of the land, but he treacherously tramples upon the most important part of that sacred covenant which holds these states together.

May it please your honors, you know, and I know, and everybody else knows, that it was the intention of the men who founded this republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct from all other branches of the government, whose sole and exclusive business it should be to distribute justice among the people according to the wants of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent, because their salaries could not be reduced; and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob, and beyond the reach of executive influence, it was not intended that they should be wholly irresponsible. For any wilful or corrupt violation of their duty they are liable to be impeached;

and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce. In ordinary, tranquil times, the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquility was not to be always anticipated in a republic. The spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed that in such times judges themselves might not be safely trusted in criminal cases,—especially in prosecutions for political offenses, where the whole power of the executive is arrayed against the accused party. All history proves that public officers of any government, when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit toward actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of hireling spies and common delators, who make merchandise of their oaths, and trade in the blood of their fellow men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I, to the revolution in 1688, the best men and purest patriots that ever lived fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Let me say here that nothing has occurred in the history of this country to justify the doubt of judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench is embodied in this simple fact: that if the executive officers of this government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done; they have gone outside of the courts, and stepped over the constitution, and created their own tribunals, composed of men whose gross ignorance and supple subservience could always be relied on for those base uses to which no judge would ever lend himself. But the framers of the constitution could act only upon the experience of that country whose history they knew most about, and there they saw the brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright. It seemed necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against the wrath and malice of his government. To that end they could think of no better provision than a public trial before an impartial jury.

I do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. I only say that it is the best protection for innocence, and the surest mode of punishing guilt, that has yet been discovered. It has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance, and judged it impartially. Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone. Within the present century, the most enlightened states of continental Europe have transplanted it into their countries; and no people ever adopted it once, and were afterwards willing to part with it. It was only in 1840 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the revolution of the Barricades gave the right of trial by jury to every Frenchman.

Those colonists of this country who came from the British islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places, where trial by jury did not exist, became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. An attempt was made to set it aside, and substitute military trials in its place, by Lord Dunmore, in Virginia, and General Gage, in Massachusetts, accompanied with the excuse which has been repeated so often in late days, namely, that rebellion had made it necessary; but it excited intense popular anger, and every colony, from New Hampshire to Georgia, made common cause with the two whose rights had been especially invaded. Subsequently the continental congress thundered it into the ear of the world as an unendurable outrage, sufficient to justify universal insurrection against the authority of the government which had allowed it to be done.

If the men who fought out our Revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have covered themselves all over with infamy as with a garment, for they would have proved themselves basely recreant to the principles of that very liberty of which they professed to be the special champions. But they were guilty of no such treachery. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to

punish without restraint. Hamilton expressed in the *Federalist* the universal sentiment of his time when he said that the arbitrary power of conviction and punishment for pretended offenses had been the great engine of despotism in all ages and all countries. The existence of such a power is utterly incompatible with freedom. The difference between a master and his slave consists only in this: that the master holds the lash in his hands, and he may use it without legal restraint, while the naked back of the slave is bound to take whatever is laid on it.

But our fathers were not absurd enough to put unlimited power in the hands of the ruler, and take away the protection of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic during seven centuries of contest with arbitrary power should sink into the ground, but the fruits of every popular victory should be garnered up in this new government. Of all the great rights already won they threw not an atom away. They went over the *Magna Charta*, the *Petition of Right*, the *Bill of Rights*, and the rules of the common law, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the executive nor party rage in the legislature could change them without destroying the government itself.

Look for a moment at the particulars, and see how carefully everything connected with the administration of punitive justice is guarded.

(1) No *ex post facto* law shall be passed. No man shall be answerable criminally for any act which was not defined and made punishable as a crime by some law in force at the time when the act was done.

(2) For an act which is criminal he cannot be arrested without a judicial warrant founded on proof of probable cause. He shall not be kidnapped and shut up on the mere report of some base spy, who gathers the materials of a false accusation by crawling into his house and listening at the keyhole of his chamber door.

(3) He shall not be compelled to testify against himself. He may be examined before he is committed, and tell his own story if he pleases, but the rack shall be put out of sight, and even his consicence shall not be tortured; nor shall his unpublished papers be used against him, as was done most wrongfully in the case of Algernon Sidney.

(4) He shall be entitled to a speedy trial; not kept in prison for an indefinite time without the opportunity of vindicating his innocence.

(5) He shall be informed of the accusation, its nature and grounds. The public accuser must put the charge into the form of a legal indictment, so that the party can meet it full in the face.

(6) Even to the indictment he need not answer unless a grand jury, after hearing the evidence, shall say upon their oaths that they believe it to be true.

(7) Then comes the trial, and it must be before a regular court, of competent jurisdiction, ordained and established for the state and district in which the crime was committed; and this shall not be evaded by a legislative change in the district after the crime is alleged to be done.

(8) His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the court. When they are called into the box, he can purge the panel of all dishonesty, prejudice, personal enmity, and ignorance by a certain number of peremptory challenges, and as many more challenges as he can sustain by showing reasonable cause.

(9) The trial shall be public and open, that no underhand advantage may be taken. The party shall be confronted with the witnesses against him, have compulsory process for his own witnesses, and be entitled to the assistance of counsel in his defense.

(10) After the evidence is heard and discussed, unless the jury shall, upon their oaths, unanimously agree to surrender him up into the hands of the court as a guilty man, not a hair of his head can be touched by way of punishment.

(11) After a verdict of guilty, he is still protected. No cruel or unusual punishment shall be inflicted, nor any punishment at all, except what is annexed by law to his offense. It cannot be doubted for a moment that, if a person convicted of an offense not capital were to be hung on the order of a judge, such judge would be guilty of murder as plainly as if he should come down from the bench, tuck up the sleeves of his gown, and let out the prisoner's blood with his own hand.

(12) After all is over, the law continues to spread its guardianship around him. Whether he is acquitted or condemned, he shall never again be molested for that offense. No man shall be twice put in jeopardy of life or limb for the same cause.

These rules apply to all criminal prosecutions; but, in addition to these, certain special regulations were required for treason,—the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. The party in power never fails, when it can, to stretch the law on that subject by construction, so as to cover its honest and conscientious opponents. In

the absence of a constitutional provision, it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of the basest minions that skulk about under the pay of the executive. Therefore a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so that prejudice and enmity might have no share in the conviction. And, lastly, the punishment was so limited that the property of the party could not be confiscated, and used to reward the agents of his persecutors, or strip his family of their subsistence.

If these provisions exist in full force, unchangeable and irrepealable, then we are not heredity bondsmen. Every citizen may safely pursue his lawful calling in the open day; and at night, if he is conscious of innocence, he may lie down in security, and sleep the sound sleep of a freeman.

I say they are in force, and they will remain in force. We have not surrenderd them, and we never will. (If the worst comes to the worst, we will look to the living God for his help, and defend our rights and the rights of our children to the last extremity.) Those men who think we can be subjected and abjected to the condition of mere slaves are wholly mistaken. The great race to which we belong has not degenerated so fatally.

III. The Substitute Plan and Modification

FIRST AID FOR TRIAL BY JURY

BY JOHN H. WIGMORE

(From *Illinois Law Review*, Vol. XX, No. 1, May, 1925, pp. 106–107. Published for the Editing Schools by Northwestern University Press, 1926. Edited by the Law Schools of University of Chicago, University of Illinois, Northwestern University)

"I nominate for the Ignoble Prize, Trial by Jury. More than forty years ago I heard that distinguished jurist, Edward J. Phelps, say in a public lecture, 'Trial by jury is a good thing which has outlived its usefulness.' Today it looks like a bad thing which continues to demonstrate its uselessness," William Lyon Phelps, in *Scribner's Magazine* for April, 1925.

1. When a superficial view with such subversive and legicidal import is responsibly and printedly expressed on a matter of civic interest, by a gentleman of such extensive erudition and such (ordinarily) even judgment and exquisitely-balanced temperament as the genial Mr. Phelps, it is certain that one of two things has happened:

(a) Either: Mr. Phelps himself (like many another good citizen) has just stubbed his personal toe on jury trial (perhaps he had to sit overnight in a foul New Haven jury-room, as a bored member of a smelly, back-alley-slander-case jury whence all (the gentlemen) but him had fled; or, perhaps even, as a plaintiff in a motor collision he had been stalled by an obviously irrational verdict);

(b) Or: In a purely rational and impersonal spirit, he is voicing precisely the educated public's conviction, with that unerring instinct which makes him today the admired literary precentor of America's best educated element in public opinion.

We promptly reject the former hypothesis, as "a priori" maximally improbable and also as totally unevidenced. We accept the latter as the obvious one.

And the question arises: What is the American Bar going to do about it?

2. We think the time has come for the American bar to awake to the situation and take it seriously.

3. Let us admit at the outset our own creed: Trial by jury must and shall be preserved! Amidst the throng of crude sacrilegisms and demi-semi-cerebrated iconoclasms that assail us nowadays in the legal sanctuary, from even the most reputable and plausible quarters, none is more shortsighted, none more dangerous, than the proposal to abolish trial by jury.

4. Of course, jury trial, as is, works badly. Of course, jury trial, as now managed, is inefficient. Of course, it exudes an aroma of repellence to the citizen, of shame to the legal profession, and of doubt to the chambered student of political science.

But take your gold watch,—your chronometer, that alone makes world-commerce what it is in modern times on land and sea. If you had not cleaned it for a decade,—if you had left it forgetfully on the stove when your egg had been rightly boiled,—if you had given it to little George to pick at the works,—if you had dropped it on the concrete pavement and not had it mended since,—if you had done this and more to it, and a friend had then suggested that it was "useless," and asked you why you still kept up the farce of carrying it,—would you think it unnatural in him?

All this, and more, have we done to trial by jury in the last hundred years in the United States.

5. But is that a good and sufficient reason for abolishing trial by jury? No more than our mishandling of a once perfectly good watch is a reason for discarding the watch—or watches in general—if it or they can be mended.

The true thing to be done about trial by jury is to MEND IT!

6. Trial by jury, as the Constitution gave it to us, is one thing. Trial by jury as we have allowed it to be spoiled by laws and practices not required by the Constitution is a very different thing. To abolish

the constitutional trial by jury is needless. (It would also be a reckless leap into the untried,—but that is a further question.) What trial by jury needs is to cleanse it from the foul dirt which harmful laws and practices have spread over its works and its face. If we cleanse and repair that watch, and wind up the original mechanism that the Constitution placed in our hands, then even Mr. Phelps, *et id omne genus rationabile,* will be compelled to admit that we have chosen the better course.

7. This comment is offered in the hope of waking up the American bar—or some part of it, at any rate—to the dangerous point that has been reached in public and private thinking outside the bar.

This is not the place to mention the essential and conclusive arguments for preserving the constitutional trial by jury. What we want to do is to urge the bar in general to face promptly the coming issue; to probe its own convictions; and to test thoroughly and officially the arguments pro and con. And we want to warn those who already have thought it out in favor of the constitutional method that their cause will soon be as good as lost if they do not now render first aid to trial by jury.

THE PROBLEM OF TRYING ISSUES

BY PROFESSOR E. R. SUNDERLAND

(From *Journal of the American Judicature Society,* Vol. XI, No. 1, April, 1928, pp. 20–28. Published bi-monthly from 357 East Chicago Avenue, Chicago)

As long as the ultimate decision rests with the jury there can be no serious encroachment by the judge. His advice will be taken when it appears to be justified by the evidence; otherwise it will fail of effect. The jury will be quick to see and resent any attempt on the part of the judge to be unfair to either party, and the concurrence of the jury in the advice of the court will be good evidence that his advice was sound. Even so radical an antagonist of judicial usurpation as Bentham recognized this when he said: "In so far as upon what he does or says depends the decision given by the jury—only in so far as what he does and says, has in their eyes the appearance of justice, can he hope to exercise any influence upon the decision they are about to pronounce."

The doctrine that a final decision on the facts from the judge alone is entirely proper and just in a so-called equity case, while the slightest intimation of the court's opinion on any part of the facts is a monstrous and fatal error in a so-called law case, is a phase of legal legerdemain which ought not to be perpetuated. There is no esoteric virtue in the chancellor which fails in the judge. Facts are facts, whether they are investigated on the law or equity side of the court.

Mr. Frank W. Grinnell says in 3 *Mass. Law Quar.* 357: "I talked with a friend of mine, a few years ago, just after he had serped as a juryman for five or six weeks. He said: 'The thing that we could not understand on the jury with which I sat was why the judge did not talk to us more about the facts and the evidence. We knew that he must have some ideas on the subject and, naturally we should have liked to hear what those ideas were so that we could consider them. That is what we would have wanted in making up our minds about anythiny outside the court room, and we could not understand why we should not be treated in the same way inside the court room and given such assistance as the judge might be able to give us. There he was, sitting upon the bench all through the trial, listening to the case with us for the purpose of doing justice, and yet he was the only man who did not talk at all about the case in any practical way. I don't know what you lawyers think about it, but I know what I think of such a situation.'"

But aside from the obvious advantages which the jury would gain from the impartial advice of the judge based upon his experience, skill and technical training, the full recognition not only of the right, but the duty of the judge to advise the jury on the facts, would produce amazing results in diminishing the costs, delays, and technicalities of jury trials. Among the most striking of the advantages, the followiny may be named:

1. It would reduce the time, strain and scandal in empaneling juries. Nowhere in the English-speaking world are there such exhibitions of judicial ataxia in obtaining juries as in the United States. Why should a judge sit helpless for days and weeks while lawyers wrangle and struggle over the selection of a jury? Why should the court be paralyzed at the whim of contentious counsel, piling up expense on the taxpayers, congesting dockets, delaying justice, and bringing the law into disrepute? Chiefly because the jury is an irresponsible and uncontrolled subject for the lawyer's manipulation. In many cases he does not try to get an impartial jury, but a jury which he can handle. If the judge by his advice can counteract the efforts to prevent a decision on the merits, such efforts will cease. This has been the experience in England and her colonies. Juries are quickly obtained and do their duty well. Justice Riddell of the Supreme Court of Ontario recently said: "I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case, and never but once heard a juryman asked a question."

2. It would facilitate the introduction of evidence. The science of special pleading is usually pointed to as the climax of legal refinement, but the science of evidence pays a much greater tribute to the microscopic discrimination of the legal mind. Errors in the admission and exclusion of evidence are not only common but inevitable,

and they bring with them appeals, reversals and retrials. But if the case is carefully analyzed for the benefit of the jury by the judge and the force and effect of the various parts of the evidence is fully explained to the jury, and the judge suggests to them what appear to him to be proper conclusions to draw from it, is not the chance of the jury being misled practically eliminated? By a perusal of the judge's advice and suggestions, it can readily be seen whether the case in its substantial aspects was clearly laid before the jury for decision. If it were, no harm has been done, for cautions from the judge are a reasonably reliable corrective for violations of rules of evidence.

3. It would enable the judge to exercise much more effective control over the conduct of the trial. The prevailing American rule prohibits any remarks from the judge, as well during the prior course of the trial as during the giving of instructions, which intimate any opinion he may hold as to whether any fact has or has not been established, as to whether any piece of epidence is entitled to much or little weight, and as to whether any witness or class of witnesses is to be deemed more or less credible. Almost every ruling he is called upon to make during the trial relates directly or indirectly to the evidence. In just so far as he is an active participant in the trial he is likely, therefore, by word or act, to give the jury some inkling as to his own impressions. A word used, a suggestive phrase dropped. an inadvertent failure to properly balance his statements, even a perfectly valid reason given for a ruling, might reveal an opinion. In every sound he utters there lurks the possibility of reversible error. Is it strange, then, that the judge inclines to hold himself aloof from the contest, to sit as an umpire or moderator, rather than as a participant in the proceeding, to let things take their own course as far as he can, and to throw the responsibility for a proper decision of the case upon the parties, the lawyers and the jury?

4. It would simplify the task of instructing the jury on the law. It is very difficult to prepare a set of instructions which will not be suggestive of matters of fact on the one hand, or be too abstract on the other. The judge must give the jury the law, but he must not intimate opinions on the facts; and yet the rules of law which he gives must be concrete and applicable to the precise facts in evidence. The court must not assume the existence of any controverted fact, must not put in doubt any uncontroverted fact, must not emphasize by special reference, nor minimize by silence, any particular facts; must not call special attention to particular witnesses, must not use ambiguous forms of grammatical expression which may or may not carry suggestive inferences as to the existence of facts. But suppose

the court should be permitted to really explain and elucidate the evidence for the jury's benefit. Most of these baffling rules and restrictions would at once disappear.

5. It would reduce the frequency of resort to that expensive remedy for bad verdicts—the new trial.

Many of the grounds for new trial are based upon the manner in which the trial was conducted and upon the justness of the verdict, as related to the evidence. Thus, the admission of improper evidence, the misconduct of counsel in improperly appealing to passion or prejudice or in bringing to the attention of the jury facts which are not proper for their consideration, excessive or insufficient verdicts, and verdicts which are against the weight of the evidence, all constitute grounds of this nature. This doctrine of new trials based upon perverse verdicts sufficiently shows that the jury are not exclusive judges of the facts. Even if they are flattered to their faces by being told so, their exclusive jurisdiction is repudiated behind their backs when their verdicts are set aside as contrary to the weight of the evidence. They are exclusive judges if they decide right, but not if they decide wrong, and the court has the final decision. Of course it may be answered that the court's decision is not final, because the only effect of its action is to send the case back to another jury. But practically there would be little use in going before another jury with the same evidence, if held by the court insufficient, for the case would be shipwrecked on the same rock as before; and if the verdict is set aside as excessive, it would be a foolish lawyer who would tempt providence by asking another jury for the same amount.

If, then, the court has the power, for all practical purposes, to prevent parties from obtaining judgments upon perverse verdicts, why should it not have the power to help juries to avoid such verdicts? Why must the court sit mute, allow the verdict to be rendered without a word of warning, and then destroy it? A supervising architect does not stand silent and allow a building to go up in a manner he cannot approve, and when it is completed at much cost, order it demolished and built over from the beginning. An executive having the veto power on legislation, if he felt any interest in obtaining needed laws, would not refrain from all comment upon pending bills until after the legislature had completed its task and adjourned, and then veto its work and force another legislature to attack the same problem without any information as to why the veto had been exercised. And yet the American people, who pride themselves on their efficiency and common sense, require or permit their courts to be run on just this plan.

If the jury is to be employed at all in civil litigation, its activity should be restricted to the finding of special issues or special verdicts. There was no general common law requirement that juries should have anything to do with matters of law, as they necessarily do have

when they render general verdicts. The parties could always prevent the jury from coming in contact with the law of the case by demurring to the evidence, and the jury could always decline to meddle with the law by rendering a special verdict. Issues of fact, on the other hand, could not by any procedural device be withdrawn from the jury, which makes it clear that the primary and essential function of the jury was to determine the facts, not to apply the law. Statutes which take away the jury's common-law right to elect between a general and special verdict, and force them, on the request of either party, to render a special verdict, do not, therefore, impair the fundamental character of trial by jury, and have been held constitutional.

The procedural weaknesses of the general verdict are two. In the first place, it allows laymen to deal with matters with which they are entirely unfamiliar and which they will necessarily remain largely ignorant in spite of all the judge may tell them, and there is no way of knowing in any case whether or to what extent the jury misunderstood the law or whether or to what extent they misapplied it. In the second place, the particular facts completely lose their identity in the general finding, so that if error occurs it vitiates the whole verdict. The jury will not be permitted to testify as to how they compounded it, and there is accordingly no way in which errors can be localized, enabling the sound portions to be saved. This is a highly uneconomical arrangement, and causes an enormous loss of effort. Both of these weaknesses are entirely avoided in the special verdict.

Texas stands in an almost unique position in regard to this problem of the verdict, having substantially abolished the general verdict in civil cases and substituted special issues. All states must eventually come to this practice, for the general verdict is the most prolific source of error and the most far-reaching cause of reversals and new trials known to procedural law.

Looking over the field of trial practice, it is quite apparent that neither the rules of pleading, nor the rules of evidence, nor the rules for obtaining or dealing with the jury, are rules of precision, but are rules of approximation only; and that determining the merits of a lawsuit, like the selection of the best candidate for an office is a complex social and not a simple logical problem. Hence technical tests are only a delusion and a snare, and are more likely to disturb than to promote the course of justice. An instinct for social service will carry both the lawyer and the judge much farther than an instinct for that emptiest of all abstractions—procedural logic.

TRIAL BY JURY

(From *Editorials of the Month*, Houston, Texas, June 30, 1930, p. 272)

From its Anglo-Saxon forebears, American civilization received many and many a priceless heritage. None of them, however, is so distinctively the badge of freedom as trial by jury.

When Englishmen demanded and exacted the right of trial by a jury of their peers, they laid the foundations upon which the structure of democracy was built. This right has become, not only the oldest, but the most sacred of the institutions of freedom. It is the strand upon which are strung the beads of "government of the people, by the people, for the people."

Just as it is the safeguard of those who respect the rights of others, and for their own rights demand respect, so trial by jury is the ever-present threat which restrains the natural wickedness of the vicious. In consequence, trial by jury has become the test of democracy. Where a trial by jury is above all else a just trial, democracy stands vindicated before the world; and, by the same token, where trial by jury becomes a travesty upon justice, then government of the people, by the people, for the people stands indicted before all mankind!

It is one of the inexorable laws of nature that no great privilege is gained except an equally great responsibility is assumed. When English-speaking people acquired the right of trial by jury, they were charged with the responsibility to keep pure and uncontaminated the institution given into their care.

Of late, in Texas as in other states of the Union, students of government have been disturbed by the apparent indifference with which citizens view their responsibility as jurors. Jury duty has become, not the privilege of a freeman, but some disagreeable task to be avoided by hook or by crook, a symptom which suggests an unwholesome condition.

Alarmed, perhaps, by such evidences of the state of the public mind, the Honorable Royall R. Watkins, Judge of the 95th District Court at Dallas, wrote and caused to be printed a most informative brochure which he calls "A Handbook for Jurors." As we understand it, every juror, reporting for service in the district courts of Dallas County, is given a copy of this booklet and requested to read it.

In undertaking this work, Judge Watkins was moved by two considerations. He wished, first, to warn jurors against conduct which so frequently results in reversals and new trials because of "misconduct of juries," thereby saving to Dallas County the tremendous sums annually spent for such needlessly extended litigation; and, finally, he desired to take advantage of a most favorable opportunity to impress upon jurors a full appreciation of their solemn responsibility and privilege.

Observers say that Judge Watkins' experiment in "juror education" has proven to be most worthwhile. Dallas County citizens already are viewing juries and jury duty in a new and more serious light.

It goes without saying that other Texas counties should follow the excellent example set in Dallas district courts. Every district court in the state should use Judge Watkins' Handbook for Jurors, or a work of similar character.

On the other hand, it is our opinion that Judge Watkins stopped just short of his full duty. It is true, of course, that he is doing a splendid work, but he should extend the scope of his service to include the public schools. He should prepare a longer treatise, guaged to the mental capacities of average high school students and make it available for special study by these boys who will be the jurors of tomorrow.

BY C. S. BRADLEY, President Texas Bar Association

(Quotation from *San Antonio Express*, July 4, 1930)

The English-speaking people everywhere use the jury as a part of their ancient heritage; and no one would abolish jury trials.

But it is not treason to criticise or suggest changes in the jury. After a practice covering many years and practically the whole range of actions, I am convinced that in many respects the jury, as it functions in Texas, is chaotic, inert, unscientific and impractical. I would not abolish, but improve that institution.

A jury of 12 of the chief justices of the supreme courts of this country, hand-picked, including the illustrious Chief Justice of the Supreme Court of the United States, as foreman, could not intelligently try and properly decide a complicated case, if treated as our juries are treated—locked up during the trial, and denied the use of pencil, paper, table, and access to the papers in the case of all documentary evidence, and not even permitted to talk about the case, among themselves, during a long and protracted trial.

The jury should be selected from the most intelligent members of the community and compelled to serve, they should be taken into the confidence of the court, and impressed with their supreme burden of responsibility for a just finding of the facts. No one challenges a judge because he may read the newspapers or talk about a sensational case, or even though he happens to have some relative or friend interested in a similar case. If the jury may not be so treated, it argues the supremacy of the judge over the jury and goes far to discredit the jury as an institution.

Give the judge the powers of a real judge, and not merely those of a moderator; make him independent as to the law of the case; and, conversely, make the jury independent of the court on the facts, and teach both that they are in fact coördinate functionaries in the trial—each supreme in its own sphere and duties. Let the judge advise, but not coerce the jury.

If all persons were perfectly honest, impartial and sufficiently intelligent and observant to know and correctly detail facts representing a transaction, the application of such facts to the controversy would be simple and easy, and could then be determined as a matter

of law. But persons who inhabit the Temples of Justice are not all honest, nor impartial, nor sufficiently intelligent and observant to meet this standard.

These limitations of humanity have necessitated the building of a set of rules for the determination of truth before controversies can be settled.

DEFECTS OF THE STATE JUDICIAL SYSTEM

BY FREDERIC A. OGG and P. ORMAN RAY

(From *Introduction to American Government*, pp. 813–815. The Century Company, Publishers, New York, 1928)

When eminent leaders of the bar, able and respected judges of both state and federal courts, deans and professors of the best law schools, and an ex-president and chief justice of the United States, concur in pronouncing the organization of our state courts and their methods of administering justice in both civil and criminal cases sadly defective, if not in grave danger of breaking down, the average lay citizen may well become interested in the situation and in the remedies which are proposed. The criticisms most frequently directed against the state judicial system fall into three main groups. The first relates to the structure or organization of the courts, including the term for which judges are chosen, their compensation, and especially the method of selecting and removing them; the failure to develop highly specialized courts for the exclusive handling of certain classes of cases; the overlapping jurisdiction of different courts, and the absence in most states of unity in judicial organization; a very general failure to recognize that the efficiency with which justice is administerd depends largely upon proper provision for handling the administrative side of court work; and the equally general failure to ensure centralized supervision over the work of judges of the different courts throughout the state, who at present are legally independent of one another and usually quite uncontrolled by any central directing head.

A second group of criticisms, although arising in part from the absence of a unified judicial system, relate chiefly to court procedure; protests (a) against the absence of rule-making power on the part of courts; (b) against the numerous petty limitations imposed upon the trial judge by legislative action; (c) against the frequent amendment, in some states, of the rules of court procedure by the legislature, often at the behest of the litigants who hope thereby to gain some advantage in a particular case; (d) against the inability of the trial judge really to control the procedure in his court as an English judge is able to do; (e) against the unlimited right of appeal which, in civil cases, works against the interest of the poor litigant and, in

criminal cases, often defeats the ends of justice; (f) against the tendency of appellate courts to reverse decisions of lower courts upon purely technical grounds not affecting the merits of the case; (g) against long delays in bringing criminal cases to trial (partly due to the cumbersome grand jury system), with the result that criminals often go scot free because of the death or disappearance of important witnesses; (h) against the unrestricted admission to bail of old offenders; (i) against the poor pay and poor quality of jurymen generally, and the inordinate delays attending the selection or empaneling of juries in criminal cases; (j) against the long-drawn-out examination of witnesses and the unlimited number of objections to testimony permitted to counsel; (k) against the rule that the failure of the accused to testify may not be commented upon before the jury by the prosecution; (l) against the requirement of unanimous verdicts by juries; (m) against the rule in a few states permitting juries to be judges of the law as well as of the facts; and finally, (n) against the absence of unified control over the various prosecuting officers throughout the state, resulting in uneven enforcement of criminal laws and lowered efficiency in the conduct of criminal prosecutions.

JUSTICE AND HORSE SENSE

BY RICHARD WASHBURN CHILD

(Extract: *Saturday Evening Post*, June 28, 1930, p. 29)

Modern methods in England.—It is the key to flexibility of procedure and to short cuts of common sense which English justice has adopted; it is the key to the application of innovations against which foreign systems of law administration have never put up the asinine obstacles we have seen raised successfully by shyster lawyers and by the old, blinking owls of our own bench and bar.

And how to organize?

Already England, some of our own states and the Federal courts—largely by the late Chief Justice Taft's sense—have begun to show the way to an organization of justice which changes the complexion of administration of justice from that of cobblers to that of a modern shoe factory, from the efforts of isolated alchemists to that of organized scientific institutions where specialists are in the laboratory, and, indeed, where there is a laboratory at all!

There is no use in talking about this until we examine what some of the experiments in such organization have been.

"The main thing to watch for in judiciary organization is to avoid the creation of a legal oligarchy," say many. "There must not be too great a separation of the judiciary from the control of the

masses," say others. That is right, but the danger of this result is slight indeed compared with the danger of political-machine control of courts.

Mr. Higgins sums up the result of the English reforms. Anyone can see that in large measure these results are the very ones we, the people of America in general, desire and need. Mr. Higgins presents better than I have, the faults in our courts by listing the virtues of the English system. He says:

"The main features of the English administration of justice which speed causes and further the determination of the merits of claims are:

"1. Certain inherent aids, including the absence of hindrances to the administration of justice, due to the habits and character of the people, such as regard for law and for the courts, the spirit of fair play, a lack of emotionalism.

"2. Adherence to the precedent of decided cases.

"3. The elasticity of the rules of procedure so as to meet the requirements of individual cases. This is due to the great amount of 'judicial discretion,' safeguarded from abuse by precedent, by provisions for review by higher authority, and by regard for the good opinion of fellow judges, due to the organization of the court.

"4. The means by which character and ability are secured for judicial service, such as appointments, high salaries, and security of tenure of office.

"5. The absence of certain physical obstacles to a more speedy and certain determination to the ultimate facts, due to reasonable hours of trial and to comfortable quarters and to other accommodations for the judge, jury, witnesses and counsel.

"6. The length of trial sessions.

"7. The means by which, on the one hand, a determination of the merits may be secured in most cases in spite of procedural mistakes, and yet, on the other hand, obedience to procedural rules may be compelled. The first is due to rules permitting amendments, to others authorizing the court or judge to disregard nonprejudicial errors, and to still others granting the court or judge power to enlarge the time for the performance of certain procedural acts; the second is due to the imposition of costs as a penalty upon the offending party or his attorney.

"8. The scope of the action to permit the joinder of parties and of claims, subject to severance or dismissal for prejudicial inconvenience to the administration of justice or to the opposite party.

"9. Efficiency due to the elimination of considerable waste of individuals, their time and effort.

"10. The constant accessibility of someone in authority to pass upon interlocutory matters, particularly upon pleadings, and motions for directions as to the conduct of individual proceedings.

"11. The judicial power to make rules of procedure, thus furnishing a ready and efficient means to procure speedy, timely, and well-drafted rules to meet the demands of procedural justice, as revealed by the daily business of the courts. This is in contrast with the slow, unscientific and often unreliable method of code making by legislative action, and is safeguarded from abuse by limitations imposed by Acts of Parliament, and by sensitiveness to popular opinion.

"12. The publicity of judicial business and accessibility to judicial statistics showing each year just how much business has been done by the courts in general and by the judges in particular, and accounting for the time and effort of the various judicial agencies.

"13. The judicial control of procedural steps to suit the varying needs of a large class of cases.

"14. The means by which dilatory attacks may be speedily determined.

"15. The simplicity and conciseness of the statements of pleadings and of other means by which claims are brought into court, due to the elimination of the necessity of pleading 'conditions precedent' and to the language and arrangement of official forms, drafted as models.

"16. The elimination from issue, as a rule, of all ultimate facts not really in controversy, so as to avoid delay and effort required for the proof of a 'prima-facie case.' This elimination is secured, or at least furthered, by the requirement of specific denials, and by the machinery provided for Interrogatories, Demand for Admissions, and Discovery and Inspection of Documents, backed by the possibility of the imposition of heavy costs for unreasonable refusals to give the information or admissions sought.

"17. The express finding of each of the ultimate facts of a claim or defense, so as to avoid new trials of all the issues, or to permit the correction of an erroneous judgment. This is accomplished by 'findings' and by special verdicts in the shape of 'answers to special questions.'

"18. The absence of certain hindrances to the speedy selection of jurors.

"19. The flexibility of the judgment, due to its severability.

"20. The elimination of considerable delay in appellate practice. This is accomplished by the simplification of the means of appeal, the shortening of the time, and the method of presenting the questions and argument."

In England, the costs of litigation and of each process and filing and judicial service are not fixed by any arbitrary legislative act. Instead, the judiciary organization establishes a flexible schedule; judges are relieved not of assessing costs but of the question of fixing costs, because they can turn the determination of costs over to a master or taxing officer who exercises discretion to punish frivolous and malicious actions and establish equitable assessments.

CRIMINAL LAW—WHAT'S WRONG WITH IT?

BY CHARLES S. POTTS

Dean of School of Law, Southern Methodist University, Dallas, Texas.

(From *The Dallas Morning News Reprints*, No. 1 of a series of fifteen articles on Texas Criminal Procedure, published in the Dallas *Morning News*, Dec. 26, 1928–Jan. 9, 1929, pp. 20–24; 26–28)

Guidance of the jury by the judge.—Another American practice that does not prevail in any other common law country is that of forbidding the judge to analyze or to comment in any way on the testimony, or on the credibility of the witnesses. While this is an exclusively American practice, it has not been universally adopted here. There are eighteen states that still adhere to the older rule of allowing the judge to guide the jury in the performance of its important function. The same practice is also followed in all the Federal courts and in those of the District of Columbia.

Practically all real students of judicial procedure are agreed that the prevailing practice in this country is bad, that it deprives the jury, in many cases floundering in a morass of complicated and contradictory testimony, of the help and guidance of the one impartial and competent person connected with the trial, and that it results in many miscarriages of justice.

This function of the trial judge has been admirably stated by the Supreme Court of the Unitd States as follows:

"It is the right and duty of the court to aid them (the jury) by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by illuminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such case, chance, mistake, or caprice may determine the result."

The committe on jurisprudence and law reform of the American Bar Association, quoting Senator Sutherland of Utah, now a member of the United States Supreme Court, put the matter in this graphic fashion:

"When we refuse to permit an experienced judge to comment on the testimony it is as though we should drive all the architects and builders into exile and construct wigwams for ourselves."

Chief Justice Taft has expressed himself vigorously in favor of the restoration to the judge of his true function as counselor and guide to the jury:

"The chief antidote for the abuse of their office by lawyers for the defense is to give to the judge who tries the case greater power than he now has in many state courts to defeat the perversions of justice by unduly zealous methods of the criminal lawyers who seek to confound the jury and mislead it. He should be able to charge the jury freely, instruct them in the principles of the law and apply those principles in such a way that the jury will understand. He should be entitled to give them wise suggestions as to the way in which they should weigh the evidence. His comment on the evidence should not be made the basis for a reversal, even if, in pointing out how the jury should consider the evidence, he may indicate something favorable to the state and against the defendant, provided only that he makes the jury understand that theirs is the ultimate responsibility in respect to the facts and that he may not control their minds. The power I am describing, and whose existence I am advocating, the Federal judges have. All English judges have it, and they exercise it much more freely than our Federal judges do. It makes for a wise and effective administration of justice and does not result in the conviction of innocent men."

Present practice the result of a petty squabble in North Carolina.— It is of interest to note that the present practice had its origin in a bitter squabble between the bench and bar in North Carolina during the turbulent times just following the close of the American Revolution. The entire judiciary of the state consisted of three judges who rode the circuits and then sat as an appellate court to review their own work as trial judges. The historian of the court says that one judge, before his selection, had been a lawyer without much practice, another had been the clerk of a court and had probably never studied law at all, and the third was a carpenter. The bar had no respect whatever for their legal ability. A bitter feud arose that resulted in an attempt on the part of the bar to impeach the judges. When this failed the bar struck at the judges in another way, by depriving them of as much power as possible, including the right, theretofore universally exercised by judges, of commenting on the evidence in criminal trials.

From North Carolina, the doctrine spread to Tennessee, which before it became a State was a part of North Carolina, and largely peopled from that State. The restriction on the power of the judge was written into the Constitution of Tennessee when it entered the Union, and many states have copied the provision without mature consideration and often in ignorance of the fact that it was a serious departure from the principles upon which the jury system was founded.

Gen. Ben Butler, stigmatized after his plunder of New Orleans as "Spoons" Butler, originated the provision in the Massachusetts laws for limiting the power of judges to comment on the evidence, while Judge J. H. Hudson has recently declared that the provision to the same effect in the Constitution of South Carolina was the result of a "deliberate design on the part of two or three able criminal lawyers in the constitutional convention to prevent verdicts of guilty in criminal cases."

Ours not the historic jury system.—From the foregoing it is clear that the emasculated jury system that we now have is not the jury system for which patriots fought through centuries of English history, and for which our fathers fought in their struggle for independence. This thought is forcibly stated by Professor Thayer, one of our most noted commentators on the law, as follows:

"It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected."

Let us conclude this article with the results reached by a group of America's greatest authorities on judicial procedure, headed by Dean John H. Wigmore of Northwestern University, Dean E. W. Hinton of Chicago University, Prof. Edmund M. Morgan of Harvard, and Prof. E. R. Sunderland of Michigan. This group of notables, in a joint volume issued in 1927, from the Yale University Press, after stating that in theory the case for allowing proper comment by the judge is "unanswerable," give a summary of the answers received from more than fifteen hundred experienced lawyers, who practice before some courts where the judge is permitted to comment on the evidence and before other courts where this privilege is denied to the judge. They summarize the results as follows:

"From these statements the conclusion seems justified that in actual practice the privilege of proper comment has the following beneficial effects: (1) It saves time and expense by bringing quicker verdicts, reducing the number of disagreements and diminishing the number of new trials. (2) It has an appreciable effect upon a substantial percentage of attorneys in making them spend less time in examining prospective jurors. In this connection, it is interesting to note that in England there is practically no expenditure of time in selecting a jury, and to ponder whether the privilege of comment, so vigorously used there, is not a contributing cause to this desirable end. (3) It operates to a considerable degree to induce the trial judge to pay close attention to the conduct of the trial. It is true that many

judges who do not comment have a proper appreciation of the judicial function and do not neglect the performance of their duties to litigants and to the jury. But certainly the privilege of comment is an added incentive to good work. Consequently, the reported experience of trial lawyers fortifies the theory that the return to the orthodox rule would greatly aid the administration of justice even without changes in the rules of evidence. It would strike a heavy blow against the 'sporting theory' of a lawsuit."

The eight specialists in procedure just quoted recommend the adoption of the following statute:

"The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof."

Who should fix the penalty, judge or jury?—In another way, in Texas and in some other Stats, we have further weakened the position of the trial judge with bad results. We have taken from him the important function that he possessed at common law of fixing the penalty after the jury had returned its verdict of guilty. In England, in Canada, in Australia, and in South Africa, the assessing of the penalty is committed to the judge, and always has been. The same is true in our Federal courts and in the courts of a large majority of the States of the Union.

Different functions of judge and jury.—Our practice of placing on the jury the assessing of the penalty is the result of a failure to perceive clearly the difference between the true functions of judge and jury. The theory of jury trial is that the jury is the fact-finding body. The one function that the jury can perform, and possibly perform better than any other agency yet developed, is to weigh the evidence and to determine whether or not the defendant is guilty of the offense charged. This question, and this alone, should go to the jury. To place upon them in addition the responsibility of assessing the punishment is to saddle them with a duty that they have neither the information, the training nor the experience to perform intelligently.

If penal codes consisted of a mere catalogue of crimes, with a definite penalty attached to each crime, it would matter very little whether the penalty were assessed by the judge or by the jury. And this was largely the case in the early history of this country when in a few states the practice grew up of requiring the jury to fix the penalty in cases where the statute provided for any discretion in the amount of the fine or the length of the term to be assessed. But times have changed, and with them our ideas of crime and punishment.

In recent decades the old idea that the punishment should fit the crime has largely given place to the belief that the punishment should fit the criminal, and that the old principle of retribution does not

reach the best social ends. As a result our penal codes provide widely different treatment for different classes of offenders, even when they have committed the same offense—probation and parole for juvenile offenders, confinement in reformatories and reform schools for young men and for women offenders, the suspended sentence and probation for first offenders and longer and still longer sentences for repeaters and hardened criminals.

To apply these modern remedies wisely required a high order of intelligence and knowledge of human nature, combined with experience and training in the reclamation of human derelicts. Such knowledge and experience, unfortunately, not many of our judges have, especially when they first go on the bench. But a judge who is intelligent and consecrated to his task will acquire by experience much of what he may lack at the outset. With the jury, however, it is altogether different. They have neither the knowledge nor the training, and cannot by any possibility gain the experience necessary for such a task. We are placing on twelve ordinary and relatively unlearned citizens, gathered from the highways and byways, a group very well qualified for finding the relatively simple fact of guilt or innocence, the very much more difficult problem of saying what the treatment should be in order to restore the socially unfit to their places in society.

Two incompatible duties.—Not only is the average juror entirely unfit for this task, but we are placing on him two mutually incompatible duties to be performed at one and the same time. To perform the one task well, that of determining the guilt or innocence of the particular crime charged, it is necessary that the juror be not influenced by a recital of other crimes committed by the defendant; and so our rules of evidence rigorously exclude such facts, lest the mind of the juror become prejudiced against the accused. But to perform the other task well, that of adjusting the punishment to the needs of the defendant, the jury needs and must have full knowledge of the defendant's past record of crime.

Let us take for example the administration of our suspended sentence law. A defendant is not entitled to have his sentence suspended if he has previously been convicted of a felony. So, an application by defendant for a suspended sentence opens the door for the prosecution to prove past offenses, which, if proven, may seriously prejudice the jurors against the defendant in the pending trial.

These considerations apply with even greater force in cases where the state is prosecuting under a statute that provides longer sentences for second, third, and fourth offenders. We have such a statute in Texas and the efficient District Attorney of Dallas County has recently successfully prosecuted under it. The celebrated Baumes law in New York, which many think should be adopted in this state, provides for marked increases in the penalty for persons convicted of

a felony a second or a third time and for a fourth conviction requires the assessment of life imprisonment in all noncapital offenses. The administration of such laws is practically impossible in a state where the duty of fixing the penalty is placed on the jury, unless we throw to the winds the time-honored doctrine that the minds of the jurors should not be prejudiced against the defendant by a recital of his former delinquencies.

Still another reason for relieving the jury of the task of assessing the penalty is that the present arrangement hampers the work of the district attorney. He has enough to do to gather the evidence in the pending case, without having to search the records of this and other states for evidence of defendant's former crimes. We have had cases here in Dallas County where a person was convicted of a felony and given a suspended sentence and later, after a change of name and disguise, committed a second felony and secured a second suspension of sentence at the hands of the jury. Such a mistake can not be rectified where the jury fixes the penalty, but defendant can easily be resentenced where the penalty is fixed by the judge.

Then, too, if the penalty is to be fixed by the jury, the rigid rules of evidence must be observed in proving defendant's former crimes, whereas, if the penalty is to be fixed by the judge, he can take his time after the end of the trial and have the defendant's record looked up by probation officers, and local, state, and national bureaus of identification. The collection of this evidence need not take the time of the judge himself and other cases can go on trial without delay. When the necessary data is all in hand the judge can then have the defendant brought into court and enter judgment and pronounce sentence upon him.

What is here proposed is that the two functions now performed by the jury in Texas be separated, that the fact-finding duty of saying whether the defendant is guilty in the particular case be left with the jury, and that the duty of fixing the penalty be restored to the judge, where it has always been in most English-speaking countries. The Constitution of the United States certainly is not in the way and there seems to be nothing in the Constitution of Texas that would prevent the change from being made by a simple legislative enactment.

Summary.—It is believed that the change here suggested would bring about the following desirable results:

1. It would relieve the jury of a task that they are not qualified to perform and place it in the hands of the judge who by reason of his training and his experience is better prepared to handle it.

2. It would relieve the jury of the responsibility of performing two incompatible duties at the same time, leaving their minds free to determine the fact of guilt or innocence, uninfluenced by proof of prior convictions. After the jury has finished its task and been discharged the judge, through various agencies accessible to him, can

secure the facts of defendant's previous crime record on which to determine the penalty to be assessed.

3. It is fairer to the defendant, since it does not permit any investigation of his criminal record until after his guilt in the pending case has been definitely determined.

4. It would tend to speed up trials and would lighten the load on the district attorney's office.

5. It would make for uniformity in the treatment of offenders of a given class, since the judge accumulates a body of experience, which the jury, changing its personnel from case to case, cannot acquire.

SUBSTITUTE FOR JURY TRIAL PROPOSED

(From *Journal of the American Judicature Society*, Vo. 10, No. 5, February, 1927, pp. 157–159. Published bi-monthly from 31 West Lake St., Chicago)

Judge Bird of Oklahoma says trial by three judges would effect much needed reform. Other substitutes for defective system gaining ground.—One of the most simple and direct proposals for avoiding the many evils ascribed to jury trial in civil cases is that trial by three judges be substituted for trial by a judge and twelve laymen. The idea makes a strong appeal to the mind of Judge J. W. Bird, of Enid, Oklahoma, who recently published an article, from which the following excerpt is taken, in *Harlow's Weekly*.

"In place of a jury I suggest a hearing by three district judges, a majority of whom could render judgment. Two judges from neighboring districts would sit as associate judges. The question and danger of allowing incompetent testimony, errors in giving or refusing instructions and the various errors common in jury trials would be a thing of the past. A mistrial would seldom, if ever, occur. Cases could be tried in one-half the time, to say nothing about the time taken in selecting and impaneling a jury. The probability of an appeal to the supreme court would be practically eliminated.

"We have reached the time in our civilization when as soon as a man is elected to office his political enemies are ready to charge him with dishonest designs. The danger of these charges would be lessened, for two of the judges would be non-residents of the district and it could not be said that they were under obligations to the voters for their election.

"I believe with this plan the court business of our state could be done and the dockets of the districts kept up, with the same number of judges we now have, with less expense to litigants and taxpayers and with less time wasted by courts and lawyers. The business of the supreme court could be kept up with one-third the number of

justices we now have, for there would be few appeals to the supreme court after a trial before three comptent judges."

Judge Bird's proposal is no novel one, for it has been advanced by other lawyers who have given it emphatic endorsement. But we do not know that it has ever been put fairly to the test of use. If any reader knows of experience of this sort we would like to hear of it. It is not hard to make *a priori* claims for the plan. Probably there would be a saving in money to the courts under this mode of trial and there would surely be a saving to the public and to litigants through a lessening of appeals. Far more important than the economical aspect, however, would be the reaction of litigants to the plan and on this score it seems highly probable that in most cases the parties would be better satisfied with a decision of three judges, passing upon both facts and law, than they are under the accustomed procedure. If this is true, then there would be a decrease in appeals not only through abolishing the need for correcting errors but also through the acceptance of the decision because of the high authority of the judges who concur in it.

Experiment is needed.—The right place for a test of the plan would appear to be in city courts, and especially in those which have the assignment of judges by an administrative head. But there may be no state where, without constitutional amendment, the substitution could be effected by compulsion. Assuming that it is hardly conceivable that a constitution could be amended so as to abolish the absolute right to jury trial in favor of an untried expedient, it seems that the only way to make a test is by offering the proposed plan as an option. If the opportunity were offered there would be instances of acceptance and if the results were satisfactory the customary trial by jury in civil cases might have a formidable competitor. If finally, after due trial, the new plan afforded the benefits expected and claimed for it, it would not be impossible to modify the constitutional protection thrown around jury trial.

In this connection it may be pointed out that the staunchest friends of things as they are, and the most stubborn opponents of experiment, are not the litigants, but the lawyers. There are several reasons for this attitude. Nearly every lawyer holds himself out as a competent jury trial lawyer, just as, until recently, most doctors assumed to perform operations as well as prescribe remedies. As long as the specialization between trial lawyers and counselors is not fully matured the young lawyer will welcome jury trial for the practice it affords him and even the older lawyer, who has demonstrated his unfitness, will cling to it because he dare not admit his weakness. Another reason for the lawyer's fondness for the jury is that it makes him a star actor in a showy drama. There would be less of this, we might say parenthetically, if the trial judge possessed his common

law prerogatives. Another prop for jury trial lies in the advantage which it undoubtedly possesses for the litigant whose case makes a sentimental appeal. Closely allied to this is the final ground, and possibly the most conclusive, that lawyers welcome the element of luck, the purely gambling chance, afforded by the jury. Not that every lawyer always prefers a chance arbitrament, but that in most cases one of them does, and if one side demands jury trial the other side has no recourse. Adding finally the factor of delay commonly incident to cases on the jury calendar, so seductive to the reluctant defendant, we see how powerful are the inducements to keep trial procedure where it is, uncertain, inexpert, slow, costly and often subject to appeals which in themselves condemn the system.

All these difficulties must be considered in relation to any considerable reform of the system, be it one of improving the mode of jury trial, or of effecting a substitution through conciliation, arbitration or trial by one or three judges.

Substitutes for jury trial.—Arbitration is now one of the most dangerous competitors for jury trial, resting as it does on mere agreement of the parties. In four states such agreements made before any controversy has arisen will be enforced by the courts and it is likely that the leading commercial states will before long achieve the same freedom of contract. It it timely, therefore, for lawyers to consider very seriously the proposal of Mr. Percy Werner, of St. Louis, who urges lawyers to try their cases before another lawyer of their own choice.

Conciliation too is likely to afford relief where it is most needed. Mr. Justice Lauer of New York City has shown how courts can save a great deal of time by affording a proper medium for bringing about settlements through judicial advice.

Finally, we should, whether a large measure of relief is afforded through arbitration, conciliation or another substitute mode of trial, nevertheless take steps to improve jury trial. There will always be many cases in which jury trial is presumably the best mode, if only in tort cases, as in England. Restoration of jury trial to the economy of time and effort and to the dignity and certainty which it should have, should not be impossible in view of the fact that it exists in Canada. Enough has been observed and said of late concerning English courts to convince the most skeptical that our jury trial methods are at every point inferior to those current in England. The objectors to reform are forced to various explanations largely summed up in the frequently heard statement that "England is not the United States." What we need now is more attention to the Canadian system of administering justice, which is quite as admirable as the English. It cannot be urged in this comparison that Canadians are essentially different from our people. In the western provinces are a hundred thousand or more settlers from the States. Except for

more efficient government, and especially in judicial administration, the people of Manitoba, Saskatchewan, and Alberta are virtually the same as the people of the states which border on these provinces.

Canadian courts are easily visited by American lawyers. There is a present need for drawing comparisons. In fact some influence is already observable among the bars of our northwestern states. It accounts in some degree doubtless for the growing desire among such lawyers to put their profession on the same plane which it has attained across the border.

MISSOURI CRIME SURVEY

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The statistical conclusions reached by this survey have shown that from the year from October 1, 1923, to October 1, 1924, there were approximately 13,000 serious major crimes reported to the police of St. Louis. Of these 13,000 offenses only 964 resulted in prosecutions. Of those prosecuted 55 were acquitted after trial by juries and 489 were released by action of the court or prosecutor, and 420 sentenced, and of those sentenced only 374 were punished. For the same offenses in Kansas City for the same year, the following results were shown. Of 5,261 offenses reported to the police department there were 276 criminal prosecutions; of those prosecuted 11 were acquitted after trial by juries and 174 were released by action of the court or prosecutor and 91 sentenced and of these sentenced only 76 were punished. The number of offenses reported to the police department comprised only about 40 per cent of all felonies committed, the remaining 60 per cent being reported to the prosecutor who keeps no records of the number of complaints filed. For that portion of the state from which information was secured, 7,032 warrants for offenses other than violations of the prohibition laws were issued, which resulted in 2,680 convictions or pleas of guilty, of which number 2,232 served some portion of the sentence imposed.

Stated in terms of percentages, the result is that our system of apprehending and prosecuting those guilty of criminal offenses is only from five per cent to ten per cent efficient; considering those apprehended and indicted for major offenses it is only from twenty-five per cent to thirty per cent efficient, and including those actually tried for major offenses about fifty per cent efficient.

SHOULD TRIAL BY JURY BE ABOLISHED?*

BY ARTHUR PENDLETON BAGBY, JR.†

It would serve no purpose, in the discussion of the jury question to trace this bulwark of personal freedom and security from its beginnings in a German forest over two thousand years ago under Tacitus. Suffice it to say that its operations since the beginning have been highly satisfactory. H. G. Wells in his "Outline of History" remarks that England owes more of her freedom, her grandeur, and her prosperity to that than to all other causes. Within the past century, the most enlightened states of continental Europe have transplanted it into their own countries; and no people ever adopted it once were afterwards willing to part with it.

Trial by jury has had the approbation not only of those who have lived under it, but of great thinkers who have looked at it calmly from a distance and judged it impartially: Montesquie and de Tocqueville speak of it with admiration as rapturous as Coke and Blackstone. It has borne the test of a longer experience and borne it better than any other legal institution that ever existed among men. It is the institution, gained after centuries of struggle upward, wrested from King John at the point of the sword at Runnymede, placed in the Petition of Rights and Bill of Rights, transplanted into this continent and written into the organic law of both this state and this nation.

Thus, it becomes obvious at the very outset that the abolotion of trial by jury would deal a crushing blow to personal liberty. As Justice Davis said in rendering the opinion of the Supreme Court of the United States in the celebrated case of *Ex Parte* Milligan: "This security of personal liberty embodied in our Constitution was such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. All persons are guaranteed the inestimable privilege of trial by jury. This privilege is the vital principle underlying the whole administration of criminal justice. By protection of this principle and in no other way can we transmit to posterity unimpaired the blessings of liberty consecrated by the sacrifices of the revolution." As long as individual liberty is to be preserved as a part of the framework of human government, trial by jury will be maintained. It is the best protection of the innocent and the surest mode of punishing the guilty that has yet been discovered.

If trial by jury were to be abolished, what guarantee would we have that the judicial tyranny of the old Star Chamber could not be reëstablished? As Lord Camden, one of England's greatest constitutional lawyers, said: "The discretion of the judge is the law of tyrants; it is always unknown; it is casual and depends upon temper

*This article was especially prepared for the Bulletin.

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and passion. In the best it is oftentimes caprice; in the worst it is every crime, folly and passion to which human nature is liable." The rights and liberties of the people cannot long survive in any country where the administration of justice is committed exclusively to a single caste.

In the words of Judge H. C. Caldwell of the United States Circuit Court of Appeals: "For a free people, trial by jury is immensely superior to any other mode of trial that the wit of man has ever devised, or is capable of devising; and evil will be the hour for the people of this country when, seduced by a theory, however plausible, or deluded by any consideration of fancied emergency or expediency, they supinely acquiesce in its invasion or consent to its abolition."

The argument is made that the jury system is inherently defective; that it has not kept step with the progress; that it is a slow and cumbersome process; that jurors are dull and illiterate; that the process of selection of jurors is slow and wasteful and innumerable other contentions are set forth as an excuse for the abolition of the jury. The proponents of such arguments, however, fail to realize that they fall into the grave error of mistaking some of the superficial defects of the present-day jury that can be easily remedied for something fundamental. For example, the quality of the jurors could easily be improved by providing educational tests; the number of challenges permitted could easily be reduced by law; because these requirements are not fixed and one state differs from the other in setting forth these rules of procedure. None are essential to the primary workings of the jury system itself.

Again, when the jury system is compared to an ox-cart in this day of rapid transportation, the objectionist fails to realize and is happily unaware of the fact that trial by jury is a fundamental principle and not a fit subject to any such analogy. Centuries ago, Pythagoras laid down the unquestionable principle that in a right triangle, the square of the hypotenuse is equal to the sum of the squares of the other two sides; yet the opponents of jury trial, with all their radicalism, would not endeavor to argue that in this modern airplane age of science such a rule is no longer true! Just so is trial by jury a fundamental axiom of a free people proven by years of trials and experiences and not capable of inherent change.

Those who would abolish trial by jury further contend to the effect that: When I am sick I call a doctor; when my auto is out of repair I employ an expert mechanic; when I want a house built, I seek a carpenter, and from these facts draw the absurd conclusion that, when I want justice I should go away from the doctor, the carpenter, and the mechanic to the hands of a judge. The fallacy of the entire argument is that while experts are necessary in certain trades and callings, the entire mass of the people have a sense of real justice

not exclusive to any one profession. It is our contention that the carpenter, the doctor, and the mechanic have a sense of justice as deep-seated and as real as any case-hardened, tyrannical judge who has spent most of his hours on the bench and is removed from the ordinary affairs of life of which he is to judge.

Furthermore, consider the fact that when a judge makes an erroneous decision, the law of precedent compels other judges to adhere to this error. But, with the jury, no such injustice prevails. As Lord Hobhouse says, "Juries are passing every day innumerable decisions, and tend to carry superfine laws down to practical life so as to make them fit for human nature's daily food." Confronted with these facts, it is obvious that justice administered by the great common people for which government has been instituted is more even-handed justice than can be expected from any expert no matter how experienced or qualified.

The contention is not made that trial by jury is perfect. No human instrument for the administration of justice can be perfect, but it is submitted that it is far better to retain a system that has withstood the tests of centuries than to experiment with one that has possibilities of evil beyond conception. As we grow in age and grace, juries like other public officers will perform their duties with unerring accuracy; they will be perfect examples of a perfect system of government; then there will be no need of juries, for then, of course, there will be no civil cases and no criminals.

Finally, it should be noted that the failure of our judicial system lies in other causes than trial by jury. The administration of justice has been inefficient not because of trial by jury but because of other factors, among these being, first, an inefficient and corrupt police system; second, the innumerable needless appeals; and, third, needless delay not caused by the jury system. Time and space does not permit a thorough discussion of each of these points, but to summarize briefly: Thos. A. Bingham, former police commissioner of New York City, says that the plunder of New York police alone totals more than $100,000,000 annually. The inefficiency and corruption of the Chicago police force is an old story of gang warfare and bribed officials. As one would-be poet has said:

"The pistol's red flare,
Bombs bursting in air,
Gave proof thru the night
That Chicago's still there."

And what is true of Chicago and New York is equally true of the other large cities of our nation on a more moderate scale. There, and there alone, lies one of the most fundamental reasons for the inefficient administration of justice in these United States!

Inefficiency is also caused by the innumerable needless appeals. In the past year, new trials were granted to 46 per cent of the cases brought before the Court of Criminal Appeals of our own State (Texas). Of this number, 60 per cent were granted on technicalities. In 1912, this same court reversed 56 per cent of its appealed cases. Furthermore, the delay that is charged against the jury system is even more apparent in the system which they themselves advocate. For example, the United States Supreme Court composed entirely of judges, is five years behind its docket. The Supreme Court of Texas, even with the commission established to assist them are more than three years behind with their work.

Calm analysis of our judiciary, it is submitted, would lead one to the conclusion that the abolition of trial by jury is not necessary; that this institution has rendered good service in the past and will render better service in the future, with slight modifications of its procedural laws; that the proposed change of trial by a tribunal of judges will augment rather than diminish or remedy the present situation; and finally, that the failure of our judicial system lies in causes not directly connected with trial by jury.